

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. M118488
(BALLOT MEASURE 37) OF	)	
Joe Shelley, CLAIMANT	)	

Claimant: Joe Shelley (the Claimant)

Property: Township 2S, Range 5E, Section 24, Tax lot 200, Clackamas 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 Joe Shelley's division of the subject 26.20-acre into three parcels or to his establishment of a dwelling on each parcel created: applicable provisions of Statewide Planning Goal 4 (Forest Lands), ORS 215, and OAR 660, division 6. These land use regulations will not apply to the claimant's division and development of the subject property only to the extent necessary to allow him to use the property for the use described in this report, to the extent that the use was permitted when he acquired the property on Aug. 19, 1966.
2. The action by the State of Oregon provides the state's authorization to the claimant to use the property for the use described in this report, subject to the standards in effect on August 19, 1966.
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

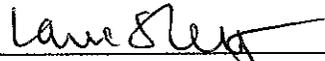
claimant first obtains that permit, license or other form of authorization or consent. Such requirements may include, but are not limited to: a building permit, a land use decision, a permit as defined in ORS 215.402 or ORS 227.160, other permits or authorizations from local, state or federal agencies, 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 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.

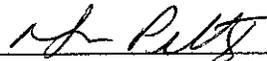
FOR DLCD AND THE LAND CONSERVATION  
AND DEVELOPMENT COMMISSION:



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:** M118488

**NAME OF CLAIMANT:** Joe Shelley

**MAILING ADDRESS:** 5225 Southeast El Centro Way  
Milwaukie, Oregon 97267

**PROPERTY IDENTIFICATION:** Township 2S, Range 5E, Section 24  
Tax lot 200  
Clackamas County

**OTHER CONTACT INFORMATION:** James D. Vick, Attorney  
Vick & Conroyd, LLP  
698 12<sup>th</sup> Street  
Salem, Oregon 97301

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

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

**I. SUMMARY OF CLAIM**

The claimant, Joe Shelley, seeks compensation in the amount of \$400,000 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.<sup>2</sup> The claimant desires compensation or the right to divide the 26.20-acre property into three parcels and to develop a dwelling on each of the parcels. The property is located at the geographical coordinates listed above, 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 the claim is valid. Department staff

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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).

<sup>2</sup> The claim indicates that fair market value will be \$400,000 or more, if the property is divided and dwellings are authorized.

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 Joe Shelley's division of the 26.20-acre property into three parcels and development of a dwelling on each of the parcels created: applicable provisions of Statewide Planning Goal 4 (Forest Land), OAR 660, division 6 and ORS 215. These laws will not apply to the claimant only to the extent necessary to allow Joe Shelley 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 on August 19, 1966. (See the complete recommendation in Section VI. of this report.)

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

#### **Comments Received**

On June 16, 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 comment was received in response to the 10-day notice. The comment is relevant to whether a state law restricts the claimant's use of the property, and whether the restriction of the claimant's use of the property reduces the fair market value of the property. The comment has been considered by the department in preparing this report. (See comment letter in the department's claim file.)

### **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 Clackamas County's Timber District (TBR) 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 claimant, Joe Shelley, along with his sister, Audrey Morris, acquired the subject property by inheritance from the Estate of Percy T. Shelley, who died on August 19, 1966.<sup>3</sup> The claimant transferred the property into the Joe H. Shelley Trust, a revocable living trust established by the claimant, on April 24, 2003, by a Warranty Deed included with the claim.<sup>4</sup>

The Shelley family acquired the subject property on June 25, 1945, by a Warranty Deed included with the claim.

A recent Clackamas County Tax Statement for the property indicates that Joe H. Shelley, Trustee, is the current owner of the subject property.

## **Conclusions**

The claimant, Joe Shelley, is the “owner” of the subject property as that term is defined by ORS 197.352(11)(C). The claimant, Joe Shelley, acquired interest in the property on August 19, 1966. The Shelley family acquired the subject property on June 25, 1945.

### **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>3</sup> The claimant’s sister transferred her interest in the property to the claimant on March 19, 1993, by a quit claim deed included with the claim.

<sup>4</sup> Transfer of the property to a revocable living trust does not constitute a change of ownership for the purpose of this Measure 37 claim.

## **Findings of Fact**

The claim states that the desired use of the property is to “partition into three parcels and build a single-family dwelling on each parcel. This use is not permitted under current zoning.”

The claim is based generally on Clackamas County’s current Timber District (TBR) and the provisions of state law that require such zoning. The claimant’s property is zoned TBR as required by Goal 4 (Forest Land), in accord with OAR 660, division 6 and ORS 215 because the claimant’s property is “forest land” as defined by 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.) 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.

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.

The claimant’s family acquired the subject property in 1945, prior to the adoption of local or state land use regulations that currently restrict the use of the property.

## **Conclusions**

The zoning requirements, minimum lot size and dwelling standards established by Statewide Planning Goal 4 (Forest Lands) and provisions applicable to land zoned for forest use in ORS 215 and OAR 660, division 6 were all enacted after the claimant’s family acquired the subject property in 1945, and do not allow the division of the property for residential use, thereby restricting the use of the property relative to the uses allowed when the property was acquired.

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 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 \$400,000 or more as the reduction in the property's fair market value as a result of current regulations. According to the claimant's attorney, this estimate is based on the owner's belief that the value of the property will increase if the parcel is partitioned and dwellings are authorized.

Included in the claim is an opinion from a real estate broker who indicated that the value of the property, if divided into four parcels, would be \$774,000.<sup>5</sup> No appraisal or other documentation was included in the claim to substantiate the reduction in the property's fair market value.

## **Conclusions**

As explained in Section V.(1) of this report, the current owner is Joe Shelley, whose family acquired the subject property in 1945. 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. Based on the findings and conclusions in Section V.(2) of this report, laws adopted since the claimant's family acquired the property restrict division of the subject property. The claimant estimates the reduction in value due to the restrictions to be at least \$400,000.

Without an appraisal or other documentation, it is not possible to substantiate the specific dollar amount the claimant 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 state land use regulations that restrict the use of the subject property, including Goal 4, and applicable provisions of ORS 215 and OAR 660, division 6, which Clackamas County has implemented through its current Timber District (TBR). 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

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<sup>5</sup> It is not clear from the claim why four parcels were used by the broker to determine this value in the property when the claimant's desire is to divide it into three parcels.

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).

The subject property includes land within the floodplain and floodway of the Sandy River. ORS 197.352(3)(B) and (C) exempt regulations enacted to protect public health and safety and regulations required by federal law, respectively. To the extent that the floodplain and floodway designation constitute regulations to public health and safety or are required by federal laws, those regulations are exempt under ORS 197.352(3)(B) and (C) and will continue to apply to the claimant's use of the property.<sup>6</sup>

### **Conclusions**

Without a specific development proposal for the property, it is not possible for the department to determine all the laws that 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 appears 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 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. In addition, regulations limiting development in the designated flood hazard area may be exempt under ORS 197.352(3)(B) and (C). 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. 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 the department has enforced a law that restricts the use of the property in a

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<sup>6</sup> Statewide Planning Goal 7 requires local government to identify areas of natural hazards and to adopt ordinances to protect people and property from such hazards. Clackamas County has applied Zoning Ordinance Section 703, Floodplain Management District, to areas of the subject property identified as special flood hazards.

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 claimant's ability to divide the 26.2-acre property into three parcels and to develop a dwelling on each parcel. The claim asserts that the laws enforced by the Commission or department reduce the fair market value of the subject property by at least \$400,000. 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, 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 Joe Shelley to use the subject property for a use permitted at the time he acquired the property on August 19, 1966.

The claimant acquired the subject property on August 19, 1966, prior to the adoption of local or state land use regulations that currently restrict the use of the property.

### **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 Joe Shelley's division of the subject 26.20-acre into three parcels or to his establishment of a dwelling on each parcel created: applicable provisions of Statewide Planning Goal 4 (Forest Lands), ORS 215, and OAR 660, division 6. These land use regulations will not apply to the claimant's division and development of the subject property only to the extent necessary to allow him to use the property for the use described in this report, to the extent that the use was permitted when he acquired the property on Aug. 19, 1966.
2. The action by the State of Oregon provides the state's authorization to the claimant to use the property for the use described in this report, subject to the standards in effect on August 19, 1966.
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 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.