

BEFORE THE DEPARTMENT OF ADMINISTRATIVE SERVICES, THE
DEPARTMENT OF LAND CONSERVATION AND DEVELOPMENT, AND THE
BOARD AND DEPARTMENT OF FORESTRY OF THE STATE OF OREGON

IN THE MATTER OF THE CLAIM FOR)
COMPENSATION UNDER ORS 197.352) FINAL ORDER
(BALLOT MEASURE 37) OF) CLAIM NO. M 118524
Catherine L. Chisholm as a contingent)
beneficiary of the C. G. Chisholm Trust)
CLAIMANT)

Claimant: Catherine L. Chisholm (the Claimant)

Property: Tax lots 1000, 2801 and 2802, Township 2S, Range 2E, Section 16D,
Clackamas County (the Property) (the property)

Claim: The demand for compensation and any supporting information received
from the Claimant 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) and the Oregon Department of Forestry (the ODF Report) both attached to and by this reference incorporated into this order.

ORDER

The Claim is denied as to laws administered by the Oregon Department of Forestry or the Oregon Board of Forestry, for the reasons set forth in the ODF Report.

The Claim is denied as to laws administered by DLCD and the Land Conservation and Development Commission (LCDC) for the reasons set forth in the DLCD Report.

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 chapter 125, division 145, by the Deputy Administrator for the State Services Division of the DAS as a final order of DAS under ORS 197.352, OAR chapter 125, division 145, and ORS chapter 293 and by the Oregon Board and Department of Forestry as a final order of the Board under ORS 197.352, OAR 629-001-0057, and OAR Chapter 125, division 145.

FOR DLCD AND THE LAND
CONSERVATION AND DEVELOPMENT
COMMISSION:



George Naughton, Deputy Director
DLCD

Dated this 7th day of April, 2006.

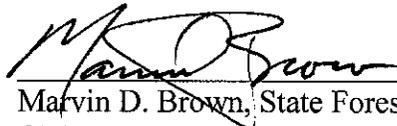
FOR the DEPARTMENT OF
ADMINISTRATIVE SERVICES:



Dugan Petty, Deputy Administrator
DAS, State Services Division

Dated this 7th day of April, 2006.

FOR THE OREGON BOARD OF
FORESTRY AND THE OREGON
DEPARTMENT OF FORESTRY:



Marvin D. Brown, State Forester
ODF

Dated this 7th day of April, 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 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 197.352¹, 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)

¹ 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.

BEFORE THE DEPARTMENT OF ADMINISTRATIVE SERVICES, THE
DEPARTMENT OF LAND CONSERVATION AND DEVELOPMENT, AND THE
BOARD AND DEPARTMENT OF FORESTRY OF THE STATE OF OREGON

IN THE MATTER OF THE CLAIM FOR)
COMPENSATION UNDER ORS 197.352)
(BALLOT MEASURE 37) OF) FINAL ORDER
Jean L. Chisholm; Craig M. Chisholm as a trustee of) CLAIM NO. M118524
the C. G. Chisholm Trust; and)
Douglas L. Chisholm as a trustee of the)
C. G. Chisholm Trust, CLAIMANTS)

Claimants: Jean L. Chisholm¹; Craig M. Chisholm as a trustee of the
C. G. Chisholm Trust; Douglas L. Chisholm as a trustee of the
C. G. Chisholm Trust; and Catherine L. Chisholm as a contingent
beneficiary of the C. G. Chisholm Trust (the Claimants)

Property: Tax lots 1000, 2801 and 2802, Township 2S, Range 2E, Section 16D,
Clackamas 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 (DLCDC) 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 DLCDC (the
DLCDC Report) and the Oregon Department of Forestry (the ODF Report) both attached
to and by this reference incorporated into this order.

ORDER

The Claim is denied as to laws administered by the Oregon Department of Forestry or the
Oregon Board of Forestry, for the reasons set forth in the ODF Report.

The Claim is approved as to laws administered by DLCDC and the Land Conservation and
Development Commission (LCDC) for the reasons set forth in the DLCDC Report, and
subject to the following terms:

¹ The department has received information that Jean L. Chisholm passed away subsequent to the filing of this Measure 37 claim. That information has not been verified as of the date of this final order. If Jean L. Chisholm has passed away, those portions of this order that grant relief to her, individually, will be deemed of no effect, and may not be enforced by the remaining claimants.

1. In lieu of compensation under ORS 197.352, the State of Oregon will not apply the following laws to Jean L., Craig M. and Douglas L. Chisholm's division of the 29.68-acre property into 19 one-acre or larger parcels for residential development: Goal 14 and the applicable provisions of OAR 660-004-0040. These land use regulations will not apply to the claimants only to the extent necessary to allow them to use the subject property for the use described in this report, and, as to Jean Chisholm, only to the extent that use was permitted when she acquired the property on October 23, 1968, and as to Craig and Douglas Chisholm, only to the extent that use was permitted when they acquired the property on January 2, 1990.

2. The action by the State of Oregon provides the state's authorization to claimant Jean Chisholm to use the property for the use described in this report, subject to the standards in effect on October 23, 1968, and the state's authorization to claimants Craig M. and Douglas L. Chisholm to use the property for the use described in this report, subject to the standards in effect on January 2, 1990. In 1990, property was subject to Goal 14, as implemented by the county's acknowledged RRFF-5 zoning.

3. To the extent that any law, order, deed, agreement or other legally enforceable public or private requirement provides that the subject 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 227.160, other permits or authorizations from local, state or federal agencies and restrictions on the use of the subject property imposed by private parties.

4. Any use of the subject 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 Section 3.

5. Without limiting the generality of the foregoing terms and conditions, in order for the claimants to use the subject 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 subject 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.

This Order is entered by the Oregon Board and Department of Forestry as a final order of the Board under ORS 197.352, OAR 629-001-0057, and OAR Chapter 125, division 145.

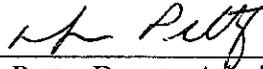
FOR DLCD AND THE LAND
CONSERVATION AND DEVELOPMENT
COMMISSION:



George Naughton, Deputy Director
DLCD

Dated this 7th day of April, 2006.

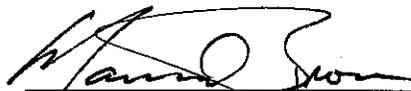
FOR the DEPARTMENT OF
ADMINISTRATIVE SERVICES:



Dugan Petty, Deputy Administrator
DAS, State Services Division

Dated this 7th day of April, 2006.

FOR THE OREGON BOARD OF
FORESTRY AND THE OREGON
DEPARTMENT OF FORESTRY:



Marvin D. Brown, State Forester
ODF

Dated this 7th day of April, 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 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 197.352², 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.”

² 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.

ORS 197.352 (BALLOT MEASURE 37) CLAIM FOR COMPENSATION

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

April 5, 2006

STATE CLAIM NUMBER: M118524

NAMES OF CLAIMANTS: Jean L. Chisholm;
Craig M. Chisholm as a trustee of the
C. G. Chisholm Trust;
Douglas L. Chisholm as a trustee of the
C. G. Chisholm Trust; and
Catherine L. Chisholm as a contingent
beneficiary of the C. G. Chisholm Trust.

MAILING ADDRESSES:

Jean L. Chisholm
4 Greenridge Drive
Lake Oswego, Oregon 97035

Craig M. Chisholm
473 Sixth Street
Lake Oswego, Oregon 97034

Douglas L. Chisholm
1280 Chandler Street
Lake Oswego, Oregon 97034

Catherine L. Chisholm
3522 Southwest Texas Street
Portland, Oregon 97219

PROPERTY IDENTIFICATION: Township 2S, Range 2E, Section 16D
Tax lots 1000, 2801 and 2802
Clackamas County

OTHER CONTACT INFORMATION: Steven R. Schell, attorney at law
Black Helderline, LLP
1900 Fox Tower
805 Southwest Broadway
Portland, Oregon 97205

DATE RECEIVED BY DAS: May 27, 2005

180-DAY DEADLINE: April 11, 2006¹

¹ This date reflects 180 days from the date the claim was submitted, as extended by the 139 days that all timelines under Measure 37 were suspended during the pendency of the *MacPherson v. DAS* appeal.

I. SUMMARY OF CLAIM

The claimants, Jean L., Craig M., Douglas L. and Catherine L. Chisholm, seek compensation in the amount of \$2,371,284 for the reduction in fair market value as a result of 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 29.68-acre property into a maximum of 19 parcels for residential development. The subject property has no street address; it is located east of the City of Gladstone, in Clackamas County, at the geographic coordinates listed above. (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 as to Jean L., Craig M. and Douglas L. Chisholm. The claim is not valid as to Catherine L. Chisholm.

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 Jean L., Craig M. and Douglas L. Chisholm's division of the 29.68-acre property into 19 one-acre or larger parcels for residential development: Statewide Planning Goal 14 (Urbanization), and the applicable provisions of OAR 660-004-0040. These laws will not apply to these claimants only to the extent necessary to allow them to use the subject property for the use described in this report, and only to the extent that use was permitted when Jean L. Chisholm acquired the property on October 23, 1968, and only to the extent that use was permitted when Craig M. and Douglas L. Chisholm acquired the property on January 2, 1990. (See the complete recommendation in Section VI. of this report.)

III. COMMENTS ON THE CLAIM

Comments Received

On June 27 and June 28, 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.

One of the comments is relevant to whether the claimants are owners. This comment has been considered by the department in preparing this report. The other comments do not address whether the claim meets the criteria for relief under ORS 197.352. Comments concerning the effects a use of the subject property may have on surrounding areas are generally 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 waive a state law. (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 Measure 37 (December 2, 2004), within two years of that effective date, as extended by the 139 days enforcement of the Measure was suspended during the pendency of the *MacPherson v. DAS* appeal, 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 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 27, 2005, for processing under OAR 125, division 145. The claim identifies ORS 197, 215 and 527, OAR 629 and 660 and “any other State Law or Rule restricting development on the property subject to this claim,” as the basis for the claim. Only laws that were enacted or adopted prior to December 2, 2004, are the basis for this claim.

Conclusions

The claim has been submitted within two years of the effective date of Measure 37 (December 2, 2004), as extended by the 139 days enforcement of the Measure was suspended during the pendency of the *MacPherson v. DAS* appeal, based on land use regulations enacted or 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 the statute. ORS 197.352(11)(C) defines “owner” as “the present owner of the property, or any interest therein.”

Findings of Fact

Claimant Jean Chisholm and her husband, Colin G. Chisholm, acquired the subject property on October 23, 1968, as reflected in a deed included in the claim. On January 2, 1990, Colin and Jean Chisholm created the C. G. Chisholm Trust, a revocable living trust, with their sons, claimants Craig M. and Douglas L. Chisholm as trustees. On the same day, they conveyed the subject property to the trust, as reflected by a deed also included with the claim. Claimant Catherine Chisholm is a contingent beneficiary under the trust.

The Clackamas County Assessor's Office confirms that the claimants Jean, Craig M. and Douglas L. Chisholm are the current owners of the subject property.

Conclusions

Claimant Jean L. Chisholm is an "owner" of the subject property as that term is defined by ORS 197.325(11)(C), as of October 23, 1968.

Claimants Craig M. and Douglas L. Chisholm are "owners" of the subject property as that term is defined by ORS 197.352(11)(C), as of January 2, 1990. Claimant Jean L. Chisholm is a "family member" of claimants Craig M. and Douglas L. Chisholm, as that term is defined by ORS 197.352(11)(A), with a family acquisition date of October 23, 1968.

Claimant Catherine L. Chisholm is not an "owner" of the subject property, as that term is defined by ORS 197.352(11)(C) because she is not a current owner of the subject property.

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 indicates that the claimants desire to divide the subject property into one-acre or larger lots for residential development, and Clackamas County's current zoning, which requires a five-acre minimum lot size, prohibits the desired division.

The claim is based generally on Clackamas County's current Rural Residential Farm/Forest 5-Acre (RRFF-5) zone and the provisions of state law that require such zoning. The county's RRFF-5 zone is a rural residential zone as required by Goal 14, which generally requires that land outside of Urban Growth Boundaries (UGBs) be used for rural uses.²

Goal 14 was effective on January 25, 1975, and requires that local comprehensive plans identify and separate urbanizable land from rural land in order to provide for an orderly and efficient transition from rural to urban land use. In 2000, as a result of a 1986 Oregon Supreme Court decision,³ the Commission amended Goal 14 and adopted OAR 660-004-0040 (Application of Goal 14 to Rural Residential Areas), which was effective on October 4, 2000. For rural residential properties less than one mile from the UGB for the Portland

² The claim also cites several provisions of ORS 197, 215 and 527 and OAR 629 and 660 as restrictions on the claimants' property. Neither the commission nor the department enforces ORS 527 or OAR 629. Those laws are enforced by the Department of Forestry, which will address their applicability in a separate report. With regard to provisions of ORS 197 and 215 and OAR 660, except for the provisions of OAR division 4 discussed in this report, those laws do not, on their face, appear to restrict the use of the subject property. In the absence of any explanation by the claimants as to how these laws restrict the use of the subject property, this report does not address them further.

³ *1000 Friends of Oregon v. LCDC (Curry County)*, 301 Or 447 (1986).

metropolitan area, the rule states that the minimum area for any new lot or parcel shall be 20 acres. (OAR 66-004-0040(8)(e)).⁴ The subject property is located within one mile of the UGB for the Portland metropolitan area and is therefore, subject to the 20-acre minimum lot size standard under this rule.

Claimant Jean L. Chisholm acquired the subject property in 1968, prior to the adoption of the statewide planning goals and their implementing statutes and rules. At that time, it was zoned Rural Agricultural by the county, which allowed the creation of lots at least one acre in size.

Conclusions

The minimum lot size requirements for rural residential lots or parcels established by Goal 14 and OAR 660-004-0040, adopted since claimant Jean L. Chisholm acquired the subject property in 1968, prohibit division of the property into smaller lots or parcels for residential development. These laws restrict the use of the subject property relative to uses allowed when claimant Jean L. Chisholm acquired the property in 1968.

This report addresses only those state laws that are identified in the claim, or that the department is certain apply to the subject property based on the use 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 which laws apply to a use of the subject 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 \$2,371,284 as the reduction in the subject property's fair market value due to current regulations. This amount is based on four conceptual site plans showing the subject property divided into between 12 and 19 lots, tax values⁵ and comparable sales minus 20 percent for roads and utilities and minus \$25,000 per lot for development.

⁴ The Portland metropolitan service area does not have an urban reserve area acknowledged to comply with OAR 660, division 21. Therefore, the provisions under OAR 660-004-0040(d), exempting lots or parcels from the 20-acre standard, do not apply.

⁵ Values used in the claim total \$583,956: \$336,058 for tax lot 1000, \$116,572 for tax lot 2801 and \$131,326 for tax lot 2802 (see the claim). The Clackamas County Assessor estimates the current real market value of the subject property at \$716,385: \$391,636 for tax lot 1000, \$152,711 for tax lot 2801 and \$172,038 for tax lot 2802 (see the electronic correspondence between department staff and the county assessor's office in the department's claim file).

Conclusions

As explained in Section V.(1) of this report, the claimants are Jean L. Chisholm who acquired the subject property on October 23, 1968, and members of her family. Under ORS 197.352, the claimants Jean, Craig and Douglas Chisholm 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 Jean Chisholm acquired the subject property, restrict the desired division of the property. The claimants estimate the reduction in value due to the restrictions to be \$2,371,284.

Without an appraisal or other documentation, 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 the fair market value of the subject property has been reduced to some extent 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.

Findings of Fact

The claim is based on state land use regulations that restrict the use of the subject property including Goal 14 and OAR 660-004-0040, which Clackamas County has implemented through its RRF-5 zone. These land use regulations were adopted after claimant Jean Chisholm acquired the subject property.

Conclusions

Without a specific development proposal for the subject 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(3). It appears that none of the general goal, statutory and rule restrictions on divisions of rural residential land were in effect when claimant Jean Chisholm acquired the subject property. As a result, these laws are not exempt under ORS 197.352(3)(E).

Laws in effect when claimant Jean Chisholm acquired the subject property 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 subject property that have not been identified in the claim. In some cases, it will not be possible to know which 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. 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 subject 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 the 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 subject 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 laws that restrict 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 of the department 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' ability to divide the 29.68-acre property into 19 one-acre or larger parcels for residential use. The claim asserts that the laws enforced by the Commission or the department reduce the fair market value of the subject property by \$2,371,284. 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 subject 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 subject 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 Jean L. Chisholm to use the subject property for a use permitted at the time she acquired the property on October 23, 1968, and to allow Craig M. and Douglas L. Chisholm to use the subject property for a use permitted at the time they acquired the property on January 2, 1990.

On January 2, 1990, Goal 14, as implemented by the current, acknowledged Clackamas County RRF-5 zoning, applied to the subject property.

Conclusions

Based on the record, the department recommends that the claim not be approved as to Catherine L. Chisholm because she is not a current owner of the property and is therefore, not entitled to relief under ORS 197.352.

Based on the record, the department recommends that the claim be approved as to Jean L., Craig M. and Douglas L. Chisholm, 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 Jean L., Craig M. and Douglas L. Chisholm's division of the 29.68-acre property into 19 one-acre or larger parcels for residential development: Goal 14 and the applicable provisions of OAR 660-004-0040. These land use regulations will not apply to the claimants only to the extent necessary to allow them to use the subject property for the use described in this report, and, as to Jean Chisholm, only to the extent that use was permitted when she acquired the property on October 23, 1968, and as to Craig and Douglas Chisholm, only to the extent that use was permitted when they acquired the property on January 2, 1990.

2. The action by the State of Oregon provides the state's authorization to claimant Jean Chisholm to use the property for the use described in this report, subject to the standards in effect on October 23, 1968, and the state's authorization to claimants Craig M. and Douglas L. Chisholm to use the property for the use described in this report, subject to the standards in effect on January 2, 1990. In 1990, property was subject to Goal 14, as implemented by the county's acknowledged RRF-5 zoning.

3. To the extent that any law, order, deed, agreement or other legally enforceable public or private requirement provides that the subject 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 227.160, other permits or authorizations from local, state or federal agencies and restrictions on the use of the subject property imposed by private parties.

4. Any use of the subject 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 Section 3.

5. Without limiting the generality of the foregoing terms and conditions, in order for the claimants to use the subject 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 subject property by the claimants.

VII. COMMENTS ON THE DRAFT STAFF REPORT

The department issued its draft staff report on this claim on March 21, 2006. OAR 125-145-0100(3), provided an opportunity for the claimants or the claimants' 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.

ORS 197.352 (BALLOT MEASURE 37) CLAIM FOR COMPENSATION

OREGON DEPARTMENT OF FORESTRY

Final Staff Report and Recommendation

April 7, 2006

STATE CLAIM NUMBER: M 118524

NAMES OF CLAIMANTS: Jean L. Chisholm;
Craig M. Chisholm as a trustee of the C. G. Chisholm Trust;
Douglas L. Chisholm as trustee of the C. G. Chisholm Trust; and
Catherine L. Chisholm as a contingent beneficiary of the C. G. Chisholm Trust.

MAILING ADDRESS: Jean L. Chisholm
4 Greenridge Drive
Lake Oswego, OR 97035

Craig M. Chisholm
473 Sixth Street
Lake Oswego, OR 97034

Douglas L. Chisholm
1280 Chandler Street
Lake Oswego, OR 97034

Catherine L. Chisholm
3522 SW Texas Street
Portland, OR 07219

IDENTIFICATION OF PROPERTY: Township 2S, Range 2E:
Section 16D, Tax Lot 1000;
Section 16D, Tax Lot 2801; and
Section 16,D Tax Lot 2802.
Clackamas County

OTHER CONTACT INFO: Steven R. Schell (attorney)
Black Helterline LLP
1900 Fox Tower, 805 S.W. Broadway
Portland, OR 97205

DATE RECEIVED BY DAS: May 27, 2005

180-DAY DEADLINE:

April 11, 2006¹

I. SUMMARY OF CLAIM

See Department of Land Conservation and Development (DLCD) Staff Report.

II. SUMMARY OF STAFF RECOMMENDATION

Based on the findings and conclusions set forth below, the Department of Forestry (ODF) has determined the claim is not valid as to land use regulations administered by ODF or the Oregon Board of Forestry (Board) because none of the laws identified in the claim and administered by the Board or ODF restrict the claimants' right to divide the Property and develop it for residential use. ORS 527.730 provides that "[n]othing in the Oregon Forest Practices Act shall prevent the conversion of forestland to any other use." The claim submitted by the claimants proposes a conversion. To the extent that the claimants may propose a forest operation in conjunction with the conversion, claimants have not submitted a written notification as required by law. Without a notification ODF is unable to determine whether the laws listed in the claim apply to the claimant's use of the property or restrict her use of the property. As a result, ODF has not enforced an existing state land use regulation with respect to the claimant's use of the property. (See the complete recommendation in Section VI. of this report.)

III. COMMENTS ON THE CLAIM

Comments Received

See DLCD Draft Staff Report.

IV. TIMELINESS OF CLAIM

See DLCD Draft Staff Report for requirements.

Findings of Fact

The claim identifies certain specific regulations as applying to the claimant's ability to use the land by dividing the property and developing it for residential use. The regulations identified in the claim include portions of Oregon Revised Statute chapter 527 and Oregon Administrative Rules chapter 629. Only laws that were enacted prior to December 2, 2004, the effective date of ORS 197.352, are the basis for the claim. (See citations of statutory and administrative rule history of the Oregon Revised Statutes and Oregon Administrative Rules.)

¹ This date reflects 180 days for the date the claim was submitted, as extended by the 139 days that all timelines under Measure 37 were suspended during the pendency of the *MacPherson v. Dept. of Admin. Svcs.*, 340 Or 117 (2006).

Conclusions

The Claim has been submitted within two years of December 2, 2004, the effective date of ORS 197.352, based on land use regulations enacted prior to December 2, 2004, and is therefore timely filed.

V. ANALYSIS OF CLAIM

1. Ownership

The findings of the Draft Staff Report of DLCD on this claim regarding ownership are incorporated into this report by this reference.

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:

“The property subject to this claim is located in Clackamas County and is zoned RRF-5, Rural Residential Farm Forest 5 Acre. The designation limits lot sizes to a minimum of 5 acres. This zoning designation and its limitations were not in place at the time the property was acquired by a family member of the claimant.”

In the claim submitted to the Oregon Department of Forestry, the claimants cite several sections of Oregon Administrative Rules and Oregon Revised Statutes, including the following:

OAR 629	Department of Forestry
ORS 527	Insect and Disease Control; Forest Practices

These laws are administered by the Board or ODF.

One of the cited laws, ORS 527.730, conversion of forestland to other uses, states, “Nothing in the Oregon Forest Practices Act shall prevent the conversion of forestland to any other use.” There are no laws enforced by the Board or ODF restricting the use of the property as described in the claim: the division of land or its development for residential uses.

The subject property does appear to include trees. Certain uses of property are forest “operations” that are regulated under the Forest Practices Act. If trees are harvested for commercial use, some laws listed in the claim will apply to the operation.

A notification of intent to conduct a forest operation is required in order for ODF to determine whether laws it or the Board may enforce apply to the claimants' intended use of the subject property in a way that restricts the use of the subject property, and reduces its fair market value.

Conclusions

Nothing in the laws enforced by ODF or the Board applies to or restricts residential use or residential development of this property by the claimants.

Persons proposing to conduct a forest operation are required to submit a notification of the operation to ODF. Nothing in ORS 197.352 relieves an operator or landowner from this obligation, and until a notification is submitted, ODF is unable to determine whether laws it or the Board administers apply to the claimants' use of the property.

3. Effect of Regulations on Fair Market Value

In order to establish a valid claim, ORS 197.352(1) requires that any laws 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 claimants have not demonstrated that any land use regulations administered by ODF or the Board restrict their use of the subject property or reduce its fair market value.

Conclusions

The claimants have not demonstrated that laws administered by ODF or the Board restrict their use of private real property and thus, have not demonstrated that those laws reduce the fair market value of the subject property.

4. Exemptions under ORS 197.352(3)

ORS 197.352 does not apply to certain land use regulations. These exemptions are set forth in ORS 197.352(3).

Findings of Fact

ORS 197.352(3) exempts laws that were enacted before a claimant acquired their interest in the property. Jean L. Chisholm acquired an interest in the property on October 23, 1968. Claimants Craig M. and Douglas L. Chisolm acquired an interest in the property on January 2, 1990. Most forest practice laws were enacted in 1971 and 1973, although some date back to 1941. ODF is unable to determine whether 197.352(3)(E) or other exemptions in

197.352(3) may apply because the claimants have not proposed a use that is subject to these laws.

Some FPA regulations, now in OAR 629, division 630, were enacted to control water pollution resulting from forest operations. ORS 197.352(3)(B) specifically exempts regulations “restricting or prohibiting activities for the protection of public health and safety..., including pollution control.” Such regulations may apply to the property, depending upon the activities the claimants may wish to undertake.

Other FPA regulations cited by the claimants may be exempted under 197.352(3).

Conclusions

ODF concludes that certain of the listed land use regulations are likely exempt under ORS 197.352(3). Until there is a notification of an operation, however, a final determination of the applicability of the listed laws to a particular forest operation on the property cannot be made.

VI. FORM OF RELIEF

Based on the current record, the claimants are not entitled to relief under ORS 197.352 from ODF or the Board. ODF staff recommends this claim be denied because neither the Board nor ODF has enforced laws that restrict the division of the subject property into parcels or lots, and the use of the property for residential purposes.

VII. COMMENTS ON THE DRAFT STAFF REPORT

ODF issued its draft staff report on this claim on March 21, 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.