

BEFORE THE DEPARTMENT OF ADMINISTRATIVE SERVICES,  
THE DEPARTMENT OF LAND CONSERVATION AND DEVELOPMENT, AND THE  
DIVISION OF STATE LANDS OF THE STATE OF OREGON

IN THE MATTER OF THE CLAIM FOR ) FINAL ORDER  
COMPENSATION UNDER ORS 197.352 ) CLAIM NO. M118542  
(BALLOT MEASURE 37) OF )  
David Lentz, CLAIMANT )

Claimant: David Lentz (the Claimant)

Property: Tax lot 100, Township 17S, Range 4W, Section 8, Lane 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) and the Division of State Lands (DSL) (the DSL Report) both attached to and by this reference incorporated into this order.

ORDER

The Claim is denied as to laws administered by the Division of State Lands for the reasons set forth in the DSL Report.

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 David Lentz's division of the non-prime farm land portions of the subject property into approximately 16 approximately 5-acre parcels for residential use: applicable provisions of Goal 3, ORS 215 and OAR 660, division 33, enacted or adopted after January 30, 1974. These land use regulations will not apply to the claimant only to the extent necessary to allow him to use the non-prime farm land portions of the subject property for the use described in this report, and only to the extent that use was permitted when he acquired the property on January 30, 1974.
2. The action by the State of Oregon provides the state's authorization to the claimant to use the non-prime portion of the subject property for the use described in this report, subject to the

provisions of ORS 215 then in effect, including the interim planning goals set forth in ORS 215.515 (1973 edition) in effect on January 30, 1974.

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 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 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 claimant under the terms of the order will remain subject to the following laws: (a) those laws not specified in (1) above; (b) any laws enacted or enforced by a public entity other than the Commission or the department; and (c) those laws not subject to ORS 197.352, including, without limitation, those laws exempted under ORS 197.352(3).

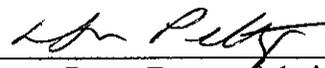
5. Without limiting the generality of the foregoing terms and conditions, in order for the claimant to use the subject property, it may be necessary for him to obtain a decision under ORS 197.352 from a city and/or county and/or metropolitan service district that enforces land use regulations applicable 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 subject property by the claimant.

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, and by the Director of the DSL as a final order under ORS 197.352, OAR 125, division 145.

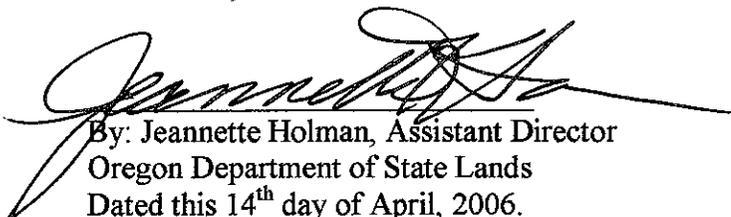
FOR DLCD AND THE LAND CONSERVATION  
AND DEVELOPMENT COMMISSION:  
Lane Shetterly, Director

  
\_\_\_\_\_  
George Naughton, Deputy Director  
DLCD  
Dated this 14<sup>th</sup> day of April, 2006.

FOR the DEPARTMENT OF ADMINISTRATIVE  
SERVICES:

  
\_\_\_\_\_  
Dugan Petty, Deputy Administrator  
DAS, State Services Division  
Dated this 14<sup>th</sup> day of April, 2006.

FOR THE DEPARTMENT OF STATE LANDS:  
Ann Hanus, Director

  
\_\_\_\_\_  
By: Jeannette Holman, Assistant Director  
Oregon Department of State Lands  
Dated this 14<sup>th</sup> day of April, 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

<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

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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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 14, 2006

**STATE CLAIM NUMBER:** M118542

**NAMES OF CLAIMANTS:** David Lentz

**MAILING ADDRESS:** (None provided)

**PROPERTY IDENTIFICATION:** Township 17S, Range 4W, Section 8  
Tax lot 100  
Lane County

**OTHER CONTACT INFORMATION:** Jill Gelineau  
William Carpenter  
1211 Southwest Fifth Ave., Suite 1900  
Portland, Oregon 97204

**DATE RECEIVED BY DAS:** June 1, 2005

**180-DAY DEADLINE:** April 16, 2006<sup>1</sup>

**I. SUMMARY OF CLAIM**

The claimant, David Lentz, seeks compensation in the amount of \$2 million 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 claimant desires compensation or the right to divide the approximately 80-acre<sup>2</sup> property into approximately 16 approximately 5-acre parcels for residential development. The subject property is located west of the City of Eugene in Lane 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 in part. 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 that all timelines under Measure 37 were suspended during the pendency of the *MacPherson v. DAS* appeal.

<sup>2</sup> The exact size of the subject property is unknown. The total acreage is not provided by the claimant nor does that information appear on the local assessor's map.

recommends that, as it relates to the prime farm land portions of the property, the claim be denied. As it relates to the non-prime farm land portion of the property, 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 claimant David Lentz's division of the non-prime farm land portion of the subject property into approximately 16 approximately 5-acre parcels for residential development: applicable provisions of Statewide Planning Goal 3 (Agricultural Lands), ORS 215 and Oregon Administrative Rules (OAR) 660, division 33, enacted or adopted after January 30, 1974. These laws will not apply to the claimant only to the extent necessary to allow him to use the non-prime farm land portion of the subject property for the use described in this report, and only to the extent that use was permitted when he acquired the property on January 30, 1974. (See the complete recommendation in Section VI. of this report.)

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

#### **Comments Received**

On July 11, 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 written comment, evidence or information 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 subject property and whether the restriction of the claimant's use of the subject property reduces the fair market value of the property. The comment has been considered by the department in preparing this report.

### **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 criteria to an application submitted by the owner, whichever is later; or
2. For claims arising from land use regulations enacted after the effective date of Measure 37 (December 2, 2004), within two years of the enactment of the land use regulation, or the date the owner of the property submits a land use application in which the land use regulation is an approval criteria, whichever is later.

## **Findings of Fact**

This claim was submitted to DAS on June 1, 2005, for processing under OAR 125. The claim identifies ORS and OAR pertaining to removal and fill of material, statewide land use planning, subdivisions and partitions as amended since 1974 and county planning and zoning as the basis for the claim. Only laws that were enacted or adopted prior to December 2, 2004, the effective date of Measure 37, 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**

The claimant, David Lentz, acquired the subject property on January 30, 1974, as reflected by warranty deed included with the claim. A May 26, 2005, title report submitted with the claim establishes the claimant’s current ownership.

## **Conclusions**

The claimant, David Lentz, is an “owner” of the subject property as that term is defined by ORS 197.352(11)(C), as of January 30, 1974.

### **2. The Laws That are the Basis for This Claim**

In order to establish a valid claim, ORS 197.352(1) requires, in part, that a law must restrict the claimant’s use of private real property in a manner that reduces the fair market value of the property relative to how the property could have been used at the time the claimant or a family member acquired the property.

## **Findings of Fact**

The claim and additional information submitted by the claimant’s representative indicate that the claimant desires to divide the approximately 80-acre property into approximately 16

approximately five-acre parcels for residential development, which is prohibited under the property's current zoning.<sup>3</sup>

The claim is based generally on Lane County's current Exclusive Farm Use (EFU) zone and the applicable provisions of state law that require such zoning. The claimant's property is zoned EFU as required by Goal 3 in accordance with ORS 215 and OAR 660, division 33, because the claimant's property is "agricultural land" as defined by Goal 3.<sup>4</sup> Goal 3 became effective on January 25, 1975, and requires that agricultural land as defined by the Goal be zoned EFU pursuant to ORS 215.

Current land use regulations, particularly ORS 215.213, 215.263 and 215.780 and OAR 660, division 33, enacted or adopted pursuant to Goal 3, prohibit the division of EFU-zoned land in marginal lands counties into parcels less than 80 acres, unless a smaller minimum lot or parcel size is approved pursuant to ORS 215.780(2), and establish standards for development of dwellings on existing or proposed parcels on that land.

ORS 215.780 establishes an 80-acre minimum size for the creation of new lots or parcels in EFU zones and became effective on November 4, 1993 (Chapter 792, Oregon Laws 1993). ORS 215.780(2) provides circumstances under which counties may adopt lower minimum lot or parcel sizes for EFU-zoned properties. In accordance with ORS 215.780(2), Lane County's acknowledged EFU zone for the subject property requires a 40-acre minimum lot or parcel size. ORS 215.263 (2005 edition) establishes standards for the creation of new parcels for non-farm uses and dwellings allowed in an EFU zone.

OAR 660-033-0135 (applicable to farm dwellings) became effective on March 1, 1994, and interprets the statutory standard for a primary dwelling in an EFU zone under ORS 215.213. OAR 660-033-0130(4) (applicable to non-farm dwellings in marginal lands counties) became effective on August 7, 1993. The Commission subsequently adopted amendments to comply with House Bill 3326 (Chapter 704, Oregon Laws 2001, effective on January 1, 2002), which were effective on May 22, 2002. (See administrative rule history for OAR 660-033-0100, -0130 and -0135.)

The claimant acquired the subject property on January 30, 1974, after the adoption of Senate Bill (SB) 100 (Chapter 80, Oregon Laws 1973, effective on October 5, 1973) but before the adoption of the statewide planning goals, effective on January 25, 1975. At that time, the county applied

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<sup>3</sup>The claim identifies provisions of ORS 92, 196, 197 and 215 as well as OAR 141 and 660 as the basis for the claim. The claim does not assert how these state land use regulations restrict the use of the property in a manner that reduces the fair market value of the property. Several of these statutes and rules are either not applicable to the subject property or do not, on their face, restrict the use of the subject property. Except for the regulations addressed in this report, and except for provisions of ORS 196 and OAR 141, which are administered by the Oregon Department of State Lands and are addressed in a separate report by that agency, absent an explanation by the claimant as to how these land use regulations restrict the use of the claimant's property in a manner that reduces the property's fair market value, these regulations are not addressed further.

<sup>4</sup> The claimant's property is "agricultural land" because it contains Natural Resources Conservation Service Class I-IV soils. According to soil maps, the subject property contains the following prime rated soils: Coburg silty clay loam; Malabon silty clay loam; and Salem gravelly silt loam. The subject property also contains the following soils rated of statewide importance: Bashaw clay; Conser silty clay loam; and Conser silty clay loam.

two different zones to different portions of the subject property: Agriculture, Grazing and Timber (AGT-5) and Airport Vicinity (AV). Both zones allowed a single-family dwelling with a 5-acre minimum parcel size for the creation of new lots or parcels.

However, during the period between October 5, 1973, when SB 100 became effective, and January 25, 1975, when the statewide planning goals became effective, ORS 197.175(1) and 197.280 (1973 editions) required, in addition to any local plan or zoning provisions, that cities and counties exercise their planning responsibilities in accordance with the interim land use planning goals set forth in ORS 215.515 (1973 edition). *Petersen v. Klamath Falls*, 279 Or 249 (1977); *see also, Meeker v. Board of Comm'rs*, 287 Or 665 (1979) (review of a subdivision is an exercise of planning responsibilities requiring application of the goals); *State Housing Council v. Lake Oswego*, 48 Or App. 525 (1981) (noting that while "[l]and use planning responsibility is not defined in ORS ch 197, the Supreme Court has interpreted that term as including annexation approvals, *subdivision approvals* [emphasis added] and partition approvals.") citing *Petersen, Meeker* and *Alexanderson v. Polk County*, 285 Or 427 (1980). The claimant's desired use includes subdivision of his land. If the claimant had sought to create that use in 1974, as a matter of law, the use would have been subject to the interim planning goals at ORS 215.515.<sup>5</sup>

The following interim goals are directly applicable to this claim: "To preserve the quality of the air, water and *land* [emphasis added] resources of the state"; "To conserve prime farm lands for the production of crops"; "To provide for the orderly and efficient transition from rural to urban land use"; "To protect life and property in areas subject to floods, landslides and other natural disasters"; "To provide and encourage a safe, convenient and economic transportation system including all modes of transportation: Air, water, rail, highway and mass transit and recognizing differences in the social costs in the various modes of transportation"; and "To develop a timely, orderly and efficient arrangement of public facilities and services to serve as a framework for urban and rural development." ORS 215.515 (1973 edition).

One of the interim goals was to "conserve prime farm lands for the production of crops." Soil types are a determinant of prime farm land. Approximately 60 percent (48 acres) of the soils on the approximately 80-acre property are rated as "prime" by the Natural Resource Conservation Service (NRCS) and approximately six percent (five acres) of the subject property is Malabon silty clay loam soil, rated Class 1 by NRCS. According to the Oregon Department of Agriculture, Oregon has only a limited supply of soils rated "prime" (8.0% of all agricultural land), and a very limited supply of soils rated Class 1 (0.9% of all agricultural land).

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<sup>5</sup> The "interim" land use goals are set forth in ORS 215.515(1)(a) to (j) (1973 edition) as follows: (a) "To preserve the quality of the air, water and land resources of the state," (b) "To conserve open space and protect natural and scenic resources," (c) "To provide for the recreational needs of citizens of the state and visitors," (d) "To conserve prime farm lands for the production of crops," (e) "To provide for the orderly and efficient transition from rural to urban land use," (f) "To protect life and property in areas subject to floods, landslides and other natural disasters," (g) "To provide and encourage a safe, convenient and economic transportation system including all modes of transportation: Air, water, rail, highway and mass transit and recognizing differences in the social costs in the various modes of transportation," (h) "To develop a timely, orderly and efficient arrangement of public facilities and services to serve as a framework for urban and rural development," (i) "To diversify and improve the economy of the state" and (j) "To ensure that the development of properties within the state is commensurate with the character and the physical limitations of the land." ORS 215.515 (1973 edition).

The claim does not establish that division of the 80-acre property into approximately 16 approximately 5-acre parcels for residential development complies with the interim planning goals. To the contrary, and in particular, the desired division of the 48 acres of "prime" farm land for residential development would not "conserve prime farm lands for the production of crops" as required by the interim goals in effect at the time the claimant acquired the subject property in 1974.

With regard to the non-prime farm land portion of the subject property, no information has been provided establishing whether or to what extent the claimant's desired division and development of that portion of the subject property complies with the interim planning goals set forth in ORS 215.515 (1973 edition) in effect at the time the claimant acquired the property on January 30, 1974.

### **Conclusions**

The current zoning requirements, minimum lot size and dwelling standards established by Goal 3, ORS 215 and OAR 660, division 33, were all enacted or adopted after the claimant acquired the subject property in 1974 and do not allow the desired division or development of the property. However, on January 30, 1974, the "interim" land use goals set forth in ORS 215.515 required the conservation of prime farm land for the production of crops. Sixty percent of the claimant's 80-acre property is composed of very limited farm land soils rated as "prime." That portion of the subject property could not have been divided for residential development under the land use goals applicable in 1974.

Based on the facts of this claim, dividing the 60 percent of the subject 80-acre property composed of prime farm land soils for residential development does not "conserve prime farm lands for the production of crops," "preserve the quality of the . . . land resources of the state," "provide for an orderly and efficient transition from rural to urban land use," "protect life and property in areas subject to floods" or provide for "a timely, orderly and efficient arrangement of public facilities and services" as required by ORS 215.515. Thus, the desired use of the prime farm land portion of the property would not have been permitted under the standards in effect when the claimant acquired the subject property. Therefore, the department determines that the current land use regulations applicable to the prime farm land portion of the subject property do not restrict its use relative to the uses allowed when the claimant acquired the property in 1974.

With regard to the portion of the subject property that does not include prime farm land, the claim does not establish whether or to what extent the claimant's desired use of that portion of the subject property complies with the interim planning goals in effect when he acquired the property on January 30, 1974.

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 claimant has identified. There may be other laws that currently apply to the claimant's use of the subject 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 which laws apply to a use of subject 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 currently apply to that use and may continue to 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 million as the reduction in the subject property’s fair market value due to current regulations. The claimant does not provide a basis for this estimate.

#### **Conclusions**

As explained in Section V.(1) of this report, the claimant is David Lentz who acquired the subject property on January 30, 1974. 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 enacted or adopted since the claimant acquired the subject property may restrict the desired division of a portion of the property. The claimant estimates the reduction in value due to the restrictions to be \$2 million.

Without an appraisal or other documentation and without verification of whether or to what extent the claimant’s desired use of the subject property was allowed under the standards in effect when the claimant acquired the property, 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 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 from the statute.

#### **Findings of Fact**

The claim is based on state land use regulations that restrict the use of the subject property, including applicable provisions of Goal 3, ORS 215 and OAR 660, division 33, which Lane County has implemented through its current EFU zone. With the exception of applicable provisions of ORS 215, including the interim land use planning goals, in effect on January 30, 1974, these state land use laws were enacted or adopted after the claimant 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 the general statutory, goal and rule restrictions on residential development and use of farm land apply to the claimant's use of the subject property, and these laws are not exempt under ORS 197.352(3)(E) to the extent they were enacted or adopted after the claimant acquired the property in 1974. Provisions of ORS 215, including the interim statewide planning goals, in effect when the claimant acquired the subject property in 1974, are exempt under ORS 197.352(3)(E) and will continue to apply to the property.

Other laws in effect when the claimant acquired the subject property are also exempt under ORS 197.352(3)(E), and will continue to apply to the claimant's use of the property. There may be other laws that continue to apply to the claimant's 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 the subject 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 subject 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 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 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 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 claimant's ability to divide the approximately 80-acre property into approximately 16 approximately 5-acre parcels for residential development. The claim asserts that the laws enforced by the Commission or the department reduce the fair market value of the

subject property by \$2 million. 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, because a portion of the property could not have been divided and developed as desired by the claimant under the standards in effect when he acquired the property, and without verification of whether or to what extent the claimant's desired use of remaining portion of the property was allowed under the standards in effect when he acquired the property, a specific amount of compensation cannot be determined. Nevertheless, based on the record for this claim, the department acknowledges that the laws on which the claim is based likely have reduced the fair market value of the 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 David Lentz to use the non-prime farm land portion of the subject property for a use permitted at the time he acquired the property on January 30, 1974.

### **Conclusions**

Based on the record, the department recommends that, as it relates to the prime farm land portion of the subject property, the claim be denied because neither the Commission nor the department has enforced laws that were enacted or adopted after the claimant acquired the property and that restrict the claimant's use of that portion of the subject property. As it relates to the non-prime portion of the subject property, 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 David Lentz's division of the non-prime farm land portions of the subject property into approximately 16 approximately 5-acre parcels for residential use: applicable provisions of Goal 3, ORS 215 and OAR 660, division 33, enacted or adopted after January 30, 1974. These land use regulations will not apply to the claimant only to the extent necessary to allow him to use the non-prime farm land portions of the subject property for the use described in this report, and only to the extent that use was permitted when he acquired the property on January 30, 1974.
2. The action by the State of Oregon provides the state's authorization to the claimant to use the non-prime portion of the subject property for the use described in this report, subject to the provisions of ORS 215 then in effect, including the interim planning goals set forth in ORS 215.515 (1973 edition) in effect on January 30, 1974.
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 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 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 claimant under the terms of the order will remain subject to the following laws: (a) those laws not specified in (1) above; (b) any laws enacted or enforced by a public entity other than the Commission or the department; and (c) those laws not subject to ORS 197.352, including, without limitation, those laws exempted under ORS 197.352(3).

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

## **VII. COMMENTS ON THE DRAFT STAFF REPORT**

The department issued its draft staff report on this claim on March 22, 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.

The department received comments on the draft report from the claimant's attorney asserting that the interim land use goals did not apply to the subdivision and residential development of the property. Also, claimant's attorney appears to be raising the possibility of commercial or other uses of some unspecified portion of the property. If there are uses of the property (other than those stated in the original claim) that the claimant desires to carry out, the claimant will need to file a new claim with the department.

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 STATE LANDS**

**Final Staff Report and Recommendation  
April 14, 2006**

**OREGON CLAIM NUMBER:** M118542

**NAME OF CLAIMANT(S):** David Lentz

**MAILING ADDRESS:** c/o Jill Gelineau and William Carpenter  
1211 SW Fifth Avenue, Suite 1900  
Portland, Oregon 97204

**IDENTIFICATION OF PROPERTY:** Township 17S, Range 4W, Section 8  
Tax Lot 1000  
Lane County  
(South of Airport Access Road)

**OTHER OWNERS AND INTEREST  
HOLDERS:** None

**DATE RECEIVED BY DAS:** June 1, 2005

**180—DAY DEADLINE:** April 16, 2006<sup>1</sup>

**I. SUMMARY OF CLAIM**

David Lentz is the claimant. The claimant seeks compensation in the amount of \$2,000,000 for the reduction in the fair market value of the property he alleges has resulted from the enforcement of certain land use regulations to restrict his use of the property. The use the claimant desires to carry out that is alleged to be prohibited, limited or otherwise restricted by a state land use regulation is to subdivide or use a series of partitions to create approximately 16 rural residential lots of approximately 5 acres each.

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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 that all timelines under Measure 37 were suspended during the *MacPherson v. DAS* appeal.

## **II. SUMMARY OF STAFF RECOMMENDATION**

Based on the findings and conclusions set forth below, the Department of State Lands (DSL) has determined that this claim does not meet the requirements for relief under ORS 197.352 as to laws administered by DSL. As a result, DSL staff recommend that the claim be denied as to state land use regulations administered by DSL.

## **III. COMMENTS**

Pursuant to OAR 125-145-0080, the Department of Administrative Services (DAS) sent notices of this claim to owners of surrounding properties and other interested parties. According to DAS, one comment was received in response to the 10-day notice. The department has considered the comment in preparing this report.

## **IV. TIMELINESS OF THE 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 December 2, 2004, written demand for compensation must be made on or before December 2, 2006, or the date the public entity applies the land use regulation as an approval criteria to an application submitted by the owner of the property, whichever is later.
2. For claims arising from land use regulations enacted after December 2, 2004, written demand for compensation must be made within two years of the enactment of the land use regulation, or the date the owner of the property submits a land use application in which the land use regulation is an approval criteria, whichever is later.

### **Findings of Fact**

This claim was submitted to DAS on June 1, 2005, for processing under OAR Chapter 125. The claim identifies Oregon Revised Statutes and Oregon Administrative Rules pertaining to removal and fill of material, statewide land use planning, subdivisions and partitions as amended since 1974 and county planning and zoning as the basis for the claim. Only laws that were enacted prior to December 2, 2004, the effective date of Measure 37, are the basis for this claim.

### **Conclusions**

The claim has been submitted on or before December 2, 2006. The claim is directed at land use regulations enacted before December 2, 2004. As a result, the claim is timely.

## V. ANALYSIS OF THE CLAIM

### 1. Present Owner(s) of the Property

#### Requirement

ORS 197.352 provides a right to compensation to the *present* owner of the property, under certain circumstances. As a result, the first question that must be answered is whether the claimant is a present owner of the property.

#### Findings of Fact

The property that is identified in this claim is stated in two places as **T17S, R4W, Sec. 8, Tax Lot 1000, Lane County, Oregon**. The claimant's status as present owner of the property is substantiated by a preliminary title report dated May 26, 2005 showing David Lentz as the current owner of property at that township, range and section, and a copy of a deed dated January 30, 1974 vesting title of such property in David Lentz. Although the letter and claim form submitted by claimant's counsel describe the property as "Tax Lot 1000," one portion of the letter also says "Mr. Lentz has been in continuous ownership of tax lot 300 since January 30, 1974," the date of the submitted deed. DSL assumes that the reference to Tax Lot 300 is a typographical error.

#### Conclusions

David Lentz is the present owner of an interest in the property.

### 2. Date of Acquisition

#### Requirement

Under ORS 197.352, a claim may be made only for laws that took effect after the present owner or family member of the present owner acquired the property. Under ORS 197.352, the right to compensation is dependent on the date when the present owner or a family member of the present owner acquired the property. A family member is defined as the wife, husband, son, daughter, mother, father, brother, brother-in-law, sister, sister-in-law, son-in-law, daughter-in-law, mother-in-law, father-in-law, aunt, uncle, niece, nephew, stepparent, stepchild, grandparent, or grandchild of the present owner of the property, an estate of any of the foregoing family members, or a legal entity owned by any one or combination of these family member or the present owner of the property.

Establishing the date of acquisition is key to determining what state laws are involved, and therefore whether the claimants' use of the property has been restricted and the fair market value of the property has been reduced.

### **Findings of Fact**

The claim alleges that David Lentz has owned the property identified as tax lot 1000 in Section 8, Township 17 South, Range 4 West since 1974. The claim includes a deed and a title report to substantiate this. The deed shows that the claimant acquired a parcel in Section 8, Township 17 South, Range 4 West from John O. Chatt and Darrel C. Smith on January 30, 1974. The title report confirms ownership of that parcel.

The claim also includes a statement that David Lentz has "been in continuous ownership of tax lot 300 since January 30, 1974." (Emphasis added.) The materials submitted did not include an explanation for the difference between the tax lot numbers. DSL assumes that the reference to tax lot 300 is a typographical error.

### **Conclusions**

The claimant, David Lentz is a present owner of an interest in the property. David Lentz acquired his interest in the property on January 30, 1974.

#### **3. The Desired Use of the Property**

The claim indicates the desired use of the property is to subdivide or use a series of partitions to create approximately 16 rural residential lots of approximately 5 acres each.

#### **4. Current State Laws that Restrict the Desired Use of the Property**

##### **Requirement**

In order for a person to have a right to compensation for an existing state law under ORS 197.352, the law must be a state "land use regulation" that is being enforced, and the law must restrict the claimants' desired use of the property. Not all laws are "land use regulations." Under ORS 197.352 a state land use regulation is: (a) a Statewide Land Use Planning Goal of LCDC; (b) a rule of LCDC; (c) statutes and rules that regulate farming and forest practices; and (d) any statute regulating the use of land or any interest therein.

### **Findings of Fact**

The State Removal-Fill Law has regulated fill and removal within waters of the state since 1979. The Department of State Lands has not made a wetland determination, a Local Wetland Inventory does not exist, and no wetland delineation has been completed for this parcel. The National Wetland Inventory shows a fairly large, horseshoe-shaped forested and emergent wetland and two much smaller wetlands on the parcel. The large

wetland corresponds to the mapped hydric soil area. Based upon the maps, it is likely that jurisdictional wetland affects about 1/5 of the parcel. The parcel does not appear to contain other "waters of the state," although a flood control easement was granted by the claimant to the Junction City Water Control District that may affect other portions of the property.

The claimant has not applied for a removal-fill permit from the state under ORS 196.800 to 196.990 and DSL has not taken any enforcement action on this parcel since December 2, 2004.

The claim lists both statutes and rules administered by DSL: ORS 196.795 to 196.990, and OAR 141-085. The statutes are Oregon's removal-fill law, which generally require a permit for the removal or fill of material in waters of the state, including wetlands. The rules listed in the claim are a portion of the administrative rules governing the removal or fill of material in waters of the state, including wetlands. The rules are not "state land use regulations" as that term is defined in ORS 197.352.

### **Conclusions**

The statutes listed in the claim are state land use regulations under 197.352. The rules listed in the claim are not state land use regulations under ORS 197.352. DSL has not enforced the listed statutes with regard to this property since December 2, 2004, and the claimant has not applied for a state permit to remove or fill within wetlands on the property. Until the claimant submits an application for a removal-fill permit, DSL has no means of determining whether the listed statutes restrict the claimant's desired use of the property (subdivision). The Removal-Fill Law regulates fill and removal of material within "waters of the state," not subdivision or partition of property.

The claimant's attorneys submitted a letter commenting on the draft DSL report on this claim. In the letter, the claimant's attorneys assert that under ORS 197.352(7), the claimant is not required to submit an application for a removal-fill permit before the state may approve a claim. This section of ORS 197.352 provides that "...the failure of an owner of property to file an application for a *land use permit* with the *local* government [shall not] serve as grounds for dismissal, abatement, or delay of a compensation claim." ORS 197.352 creates a distinction between local land use permits (a term that is defined in ORS chapters 215 and 227), and other governmental approvals that may be required for a use of property. Until an owner has sought the latter approvals, and been denied or otherwise "restricted," a public entity has not "enforced" a "land use regulation" under ORS 197.352(1).

## **5. Laws in Effect When the Present Owners Acquired the Property**

### **Requirement**

ORS 197.352 requires the state to compensate the present owners of the property if a current state law restricts the use of the property. If the state is paying compensation,

then the amount of compensation is determined by the difference in fair market value of the property with the current state land use regulations in place and the fair market value of the property if it were subject to whatever state land use regulations applied to the property when it was acquired by the present owners or a family member of the present owners (whichever occurred first). If the state elects not to pay compensation, however, it may only allow the present owners to use the property for a use permitted when they acquired the property (not when it was acquired by a family member).

As a result, in this section the report summarizes both the laws that were in effect when the present owners acquired the property, and the laws in effect when a family member of the owners acquired the property (if a family member conveyed the property to the present owners).

### **Findings of Fact**

Since 1979, the Removal-Fill Law has required a permit for removal or fill within wetlands, and required DSL to include in such permits conditions designed to mitigate for impacts to wetlands. When claimant acquired the property in 1974, there was no such requirement in state law. The use that the claimant states in his claim is to subdivide or partition the property into rural residential lots. A portion of the property does appear to be a wetland based on the National Wetland Inventory. If the claimant proposes to construct dwellings, and if the location of the dwellings is on land that is identified as jurisdictional wetland, then state statutes administered by the Department of State Lands may require a permit for filling and/or removing more than 50 cubic yards of material within any such wetland.

Until the claimant submits an application for a removal-fill permit, however, DSL is unable to determine whether state land use regulations administered by DSL restrict the use of the property. In addition, under ORS 197.352(1), DSL is authorized to provide relief to claimants only when it has enforced an existing state law through some action taken after December 2, 2004. In this case DSL has not taken any action to enforce the state Removal-Fill Law as to this property after December 2, 2004.

### **Conclusions**

Claimant acquired the property before the Removal-Fill Law began regulating fill and removal within wetlands in 1979. However, DSL has not taken any action to enforce the state Removal-Fill Law as to this property after December 2, 2004.

## **6. Effect on Fair Market Value**

### **Requirement**

There is a right to compensation under ORS 197.352 from the state only if the state enforces an existing land use regulation, and that results in a reduction in the fair market value of the property.

### **Findings of Fact**

On his claim form, the claimant listed a reduction in value for the property of approximately \$2,000,000.

The claimant states that “[i]t 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 State of Oregon, and we estimate the reduction in value is approximately \$2 million.” The claimant did not provide any documentation to support the assertion of value.

### **Conclusions**

The claim includes some evidence of reduction in value, but the owner’s statement does not appear to be based on state land use regulations that are administered by DSL and that have been enforced since December 2, 2004. As a result, DSL is unable to determine that there is any restriction on the claimant’s desired uses of the property or any reduction of the fair market value of the property.

## **7. Exemptions**

### **Requirement**

ORS 197.352 does not apply to state land use regulations that:

- Restrict or prohibit activities commonly and historically recognized as public nuisances under common law;
- Restrict or prohibit activities for the protection of public health and safety, such as fire and building codes, health and sanitation regulations, solid or hazardous waste regulations, and pollution control regulations;
- To the extent the land use regulation is require to comply with federal law;
- Restrict or prohibit the use of a property for the purpose of selling pornography or performing nude dancing; or that were
- Enacted prior to the date of acquisition of the property by the owner or a family member of the owner who owned the subject property prior to acquisition or inheritance by the owner, whichever occurred first.

### **Findings of Fact**

The claim is based on the provisions of the state Removal-Fill Law (ORS 196.800 to 196.990) that were enacted in 1979. David Lentz acquired an interest in the property in 1974. As a result, the state Removal-Fill Law does not appear to be specifically exempt under ORS 197.352(3)(E). Other exemptions may apply to laws that may restrict the claimant’s desired use of the property.

The claimants should be aware that depending on the nature of the use of the property that is finally proposed, one or more of the exemptions in ORS 197.352(3)(A)-(D) may apply. However, until the claimant applies for a removal-fill permit, DSL is unable to determine what laws and what exemptions may apply.

### **Conclusions**

This report addresses only those state laws that are identified in the claim, or that DSL is certain apply to the property based on the use (s) 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 DSL in the claim. The State Removal-Fill Law does not appear to come under the exemption in ORS 197.352(3)(E). However, there may be other laws that continue to apply to the claimant's use of the property because they were not identified in the claim. Claimants should be aware that the less information they provide to DSL in their claim, the greater the possibility that there may be additional laws that will later be determined to continue to apply to their use of the property.

## **VI. FORM OF RELIEF**

### **1. Is the Present Owner Entitled to Relief**

#### **Requirement**

A claimant is entitled to relief if:

- The claimants are present owners of the property, or an interest in the property;
- A state land use regulation enacted before December 2, 2004 is being enforced against the claimants' use of the property;
- The state land use regulation that is being enforced restricts the claimants' use of the property; and
- The restriction reduces the fair market value of the property, relative to how the property could be used when the present owners or a family member of the present owners acquired the property.

The state may either pay compensation, or not apply the state land use regulation(s) in question.

#### **Findings of fact**

Based on the information currently in its record, the claim does not provide sufficient facts to qualify for relief under ORS 197.352.

#### **Conclusions**

DSL staff denies this claim as to state land use regulations administered by DSL because

the Removal-Fill Law (the state land use regulation identified by claimant) has not been enforced by DSL as to the claimant's use of this property since December 2, 2004. In addition, the Removal-Fill Law does not prohibit development of a wetland area. Rather, that law simply requires a permit for removal or filling of more than 50 cubic yards of material within a wetland. Until claimant applies for a permit and DSL has acted on the permit application, DSL has not enforced the Oregon Removal-Fill Law and it is not possible to determine whether that law would restrict use of this property and reduce its fair market value.

## **VII. COMMENTS ON THE DRAFT STAFF REPORT**

DSL issued its draft staff report on March 22, 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 or information in response to the draft staff report and recommendation. Comments were received from the claimant's attorney and have been considered by the DSL in the issuance of the final report.