

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

IN THE MATTER OF THE CLAIM FOR	)	FINAL ORDER
COMPENSATION UNDER ORS 197.352	)	CLAIM NO. M118609
(BALLOT MEASURE 37) OF	)	
James and Susan Stiverson, CLAIMANTS	)	

Claimants: James and Susan Stiverson (the Claimants)

Property: Township 3S, Range 2W, Section 9, Tax lot 5200 , Yamhill County (the Property)

Claim: The demand for compensation and any supporting information received from the Claimants by the State of Oregon (the Claim).

Claimants submitted the Claim to the State of Oregon under ORS 197.352. Under OAR 125-145-0010 *et seq.*, the Department of Administrative Services (DAS) referred the Claim to the Department of Land Conservation and Development (DLCD) as the regulating entity. This order is based on the record herein, including the Findings and Conclusions set forth in the Final Staff Report and Recommendation of DLCD (the DLCD Report) attached to and by this reference incorporated into this order.

ORDER

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

1. In lieu of compensation under ORS 197.352, the State of Oregon will not apply the following laws to James and Susan Stiverson's division of the 3.84-acre property into two parcels for residential development: the applicable provisions of Goal 14 and OAR 660-004-0040, adopted after October 13, 1977. These land use regulations will not apply to the claimants' division of the subject property only to the extent necessary to allow them to use the property as described in this report, and only to the extent that the use was permitted when they acquired the property on October 13, 1977.
2. The action by the State of Oregon provides the state's authorization to the claimants to use the property subject to the standards in effect on October 13, 1977. On that date, the property was subject to applicable provisions of Goal 14, in effect at that time.
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 ORS 197.352(3).

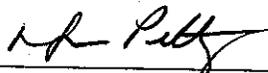
5. Without limiting the generality of the foregoing terms and conditions, in order for the claimants to use the subject property, it may be necessary for them to obtain a decision under ORS 197.352 from a city and/or county and/or metropolitan service district that enforces land use regulations applicable 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 Director of the DLCD as a final order of DLCD and the Land Conservation and Development Commission under ORS 197.352, OAR 660-002-0010(8), and OAR 125, division 145, and by the Deputy Administrator for the State Services Division of the DAS as a final order of DAS under ORS 197.352, OAR 125, division 145, and ORS 293.

FOR DLCD AND THE LAND CONSERVATION  
AND DEVELOPMENT COMMISSION:

  
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Lane Shetterly, Director  
DLCD  
Dated this 25<sup>th</sup> day of April, 2006.

FOR the DEPARTMENT OF ADMINISTRATIVE  
SERVICES:

  
\_\_\_\_\_  
Dugan Petty, Deputy Administrator  
DAS, State Services Division  
Dated this 25<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 the property, or any interest therein, shall have a cause of action in the circuit court in which the real property is located.

(Copies of the documents that comprise the record are available for review at the Department's office at 635 Capitol Street NE, Suite 150, Salem, Oregon 97301-2540)

### FOR INFORMATION ONLY

The Oregon Department of Justice has advised the Department of Land Conservation and Development that "[i]f the current owner of the real property conveys the property before the new use allowed by the public entity is established, then the entitlement to relief will be lost."

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

**ORS 197.352 (BALLOT MEASURE 37) CLAIM FOR COMPENSATION**  
**OREGON DEPARTMENT OF LAND CONSERVATION AND DEVELOPMENT**  
**Final Staff Report and Recommendation**

April 25, 2006

**STATE CLAIM NUMBER:** M118609

**NAMES OF CLAIMANTS:** James and Susan Stiverson

**MAILING ADDRESS:** 15445 Northeast Kincaid Road  
Newberg, Oregon 97132

**PROPERTY IDENTIFICATION:** Township 3S, Range 2W, Section 9  
Tax lot 5200  
Yamhill County

**DATE RECEIVED BY DAS:** June 15, 2005

**180-DAY DEADLINE:** April 30, 2006<sup>1</sup>

**I. SUMMARY OF CLAIM**

The claimants, James and Susan Stiverson, seek compensation in the amount of \$200,000 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 3.84-acre property into two parcels, one for residential development. The property is located at 15445 Northeast Kincaid Road, near Newberg, in Yamhill County. (See claim.)

**II. SUMMARY OF STAFF RECOMMENDATION**

Based on the findings and conclusions set forth below, the Department of Land Conservation and Development (the department) has determined that the claim is valid. Department staff recommends 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 James and Susan Stiverson's division of the 3.84-acre property into two parcels, one for residential development: applicable provisions of Statewide Planning Goal 14 (Urbanization) and of Oregon Administrative Rules (OAR) 660-004-0040, adopted after October 13, 1977. These land use regulations will not apply to the claimants only to the extent necessary to allow them to use the property for the use described in this report, and only to the extent that use was permitted when they acquired the property on October 13, 1977. (See the complete recommendation in Section VI. of this report.)

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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 *MacPherson v. Dept. of Admin. Svcs.*, 340 Or 117 (2006).

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

#### **Comments Received**

On July 20, 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, two written comments, evidence or information were received in response to the 10-day notice.

The comments do not address whether the claim meets the criteria for relief under ORS 197.352. Comments concerning the effects a use of the 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 the 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 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 15, 2005, for processing under OAR 125, division 145. The claim identifies Goal 14 and OAR 660-004-0040 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), 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 claimants, James and Susan Stiverson, acquired the subject property on October 13, 1977, as reflected by a quit claim deed<sup>2</sup> included with the claim. A 2005 Yamhill County tax statement submitted with the claim establishes the claimants’ current ownership.

### Conclusions

The claimants, James and Susan Stiverson, are “owners” of the subject property as that term is defined by ORS 197.352(11)(C), as of October 13, 1977.

### 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 Yamhill County zoning ordinance number 502 changed the zoning of the property to 2.5-acre minimum lot size from no lot size restriction in 1975.

The claim is based generally on Yamhill County’s current Very Low Density Residential 2.5-acre minimum lot size (VLDR-2.5) zone and the applicable provisions of state law that require such zoning. The county’s VLDR-2.5 zone is a rural residential zone as required by Goal 14, which generally requires that land outside of urban growth boundaries be used for rural uses.

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,<sup>3</sup> the Commission amended Goal 14 and adopted OAR 660-004-

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<sup>2</sup> The deed states: “This deed is given solely to effectuate transfer of any title previously held by GrantORS as constructive trustees for the benefits of the Grantees.” Ina F. Smith is James Stiverson’s sister who with her husband Rodney F. Smith purchased the property for James and Susan Stiverson on April 4, 1973 (as stated in a notarized note attached to the claim and dated March 14, 2005). Other than the note, signed by Rodney and Ina Smith on March 14, 2005, James and Susan Stiverson do not appear on any deed attached to the claim prior to October 13, 1977.

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

0040 (Application of Goal 14 to Rural Residential Areas), which was effective on October 4, 2000. The rule establishes minimum acreage standards for approval of new lots or parcels in rural residential zones, depending on the location and the local rural residential designation of the property at issue.

The rule states that if a county rural residential zone in effect on October 4, 2000, specifies a minimum lot size of two acres or more, the area of any new lot or parcel shall equal or exceed the minimum lot size that is already in effect (OAR 660-004-0040(7)(c)). Some relief from this provision is available for lots or parcels having more than one permanent habitable dwelling pursuant to OAR 660-004-0040(7)(h). The rule also provides that a county minimum lot size requirement in a rural residential zone cannot be amended to allow a smaller minimum lot size without approval of an exception to Goal 14 (OAR 660-004-0040(6)). Because Yamhill County's rural residential zone was in effect on October 4, 2000, and requires a minimum lot size of 2.5 acres, the minimum lot size for any new lot or parcel must equal or exceed 2.5 acres. The subject 3.84-acre property cannot be divided as desired by the claimants without a Goal 14 exception.

The claimants acquired the property after the adoption of the statewide planning goals, but before the Commission acknowledged Yamhill County's land use regulations to be in compliance with statewide planning goals pursuant to ORS 197.250 and 197.251. Because the Commission had not acknowledged Yamhill County's plan and land use regulations when the claimants acquired the property in 1977, the statewide planning goals, including Goal 14, applied directly to the claimants' property when they acquired it.<sup>4</sup>

### Conclusions

The minimum lot size requirements for rural residential lots or parcels established by Goal 14 and OAR 660-004-0040 were adopted after the claimants acquired the subject property in 1977, and do not allow the desired division of the property, thereby restricting the use of the property. When the claimants acquired the subject property in 1977, the statewide planning goals, and in particular the general requirements of Goal 14, applied directly to the property. As interpreted by the Commission (OAR 660-040-0040), Goal 14 generally required a minimum lot size of at least two acres. The claim does not establish whether or to what extent the claimants' desired level of development would have been permitted under the laws in effect in 1977 when the claimants acquired the property.

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.

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<sup>4</sup> The statewide planning goals became effective on January 25, 1975, and were applicable to legislative land use decisions and some quasi-judicial land use decisions prior to the Commission's acknowledgment of each county's land use regulations. *Perkins v. City of Rajneeshpuram*, 300 Or 1 (1985); *Alexanderson v. Polk County*, 289 Or 427, rev den 290 Or 137 (1980); *Sunnyside Neighborhood Assn. v. Clackamas County*, 280 Or 569 (1977); *Jurgenson v. Union County*, 42 Or App 505 (1979); and *1000 Friends of Oregon v. Benton County*, 32 Or App 413 (1978). After the county's plan and land use regulations were acknowledged by the Commission, the statewide planning goals and implementing rules no longer directly applied to such local land use decisions. *Byrd v. Stringer*, 295 Or 311 (1983). However, statutory requirements continue to apply, and insofar as the state and local provisions are materially the same, the local provisions must be interpreted consistent with the substance of the goals and implementing rules. *Foster v. Polk County*, 115 Or App 475 (1992); *Kenagy v. Benton County*, 115 Or App 131 (1992).

There may be other laws that currently apply to the claimants' use of the subject 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 \$200,000<sup>5</sup> as the reduction in the property's fair market value due to current regulations. Other than the claimants' statement of what an additional developable parcel would be worth, the estimated amount is not substantiated in the claim.

#### **Conclusions**

As explained in Section V.(1) of this report, the claimants are James and Susan Stiverson who acquired the property on October 13, 1977. Under ORS 197.352, the claimants are due compensation for land use regulations that restrict the use of the subject property in a manner that reduces its fair market value. Based on the findings and conclusions in Section V.(2) of this report, laws adopted since the claimants acquired the property restrict the desired division of the subject property. The claimants estimate the reduction in value due to the restrictions to be \$200,000.

Without an appraisal or other documentation, and without verification of whether or the extent to which the property could be divided in 1977, 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 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.

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<sup>5</sup> The claimants, in the Measure 37 claim filed with Yamhill County, indicate the amount of reduction to be between \$125,000 and \$200,000. These estimates are not documented, and no certified appraisal was included in the claim to substantiate their claim.

## **Findings of Fact**

The claim is based on state land use regulations that restrict the use of the claimants' property, including Goal 14 and OAR 660-004-0040, which Yamhill County has implemented through the VLDR-2.5 zone. With the exception of provisions of Goal 14 in effect when the claimants acquired the property on October 13, 1977, these land use regulations are not exempt under ORS 197.352(3)(E). Provisions of Goal 14 in effect on October 13, 1977, are exempt under ORS 197.352(3)(E), which exempts laws in effect when the claimants acquired the property.

## **Conclusions**

Without a specific development proposal for the 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. It appears that the general statutory, goal and rule restrictions on residential development apply to the claimants' 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 claimants acquired the property. Provisions of Goal 14 in effect when the claimants acquired the property in 1977 are exempt under ORS 197.352(3)(E), and will continue to apply to the subject property.

Other laws in effect when the claimants acquired the subject property are also 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 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. In some cases, some of these laws may be exempt under ORS 197.352(3)(A) to (D).

This report addresses only those state laws that are identified in the claim, or that the department is certain apply to the property based on the uses that the claimants have identified. Similarly, this report only addresses the exemptions provided for under ORS 197.352(3) that are clearly applicable, given the information provided to the department in the claim. The claimants should be aware that the less information they have provided to the department in 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 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 claimants' ability to divide the subject 3.84-acre property into two 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 \$200,000. However, because the claim does not provide an appraisal or other specific documentation for how the specified restrictions reduce the fair market value of the property, and without verification of the extent to which the claimants' desired use would have been permitted when they acquired the property, a specific amount of compensation cannot be determined. Nevertheless, based on the record for this claim, the department acknowledges that the laws on which the claim is based likely have reduced the fair market value of the 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 James and Susan Stiverson to use the subject property for a use permitted at the time they acquired the property on October 13, 1977.

## **Conclusions**

Based on the record, the department recommends that the claim be approved, subject to the following terms:

1. In lieu of compensation under ORS 197.352, the State of Oregon will not apply the following laws to James and Susan Stiverson's division of the 3.84-acre property into two parcels for residential development: the applicable provisions of Goal 14 and OAR 660-004-0040, adopted after October 13, 1977. These land use regulations will not apply to the claimants' division of the subject property only to the extent necessary to allow them to use the property as described in this report, and only to the extent that the use was permitted when they acquired the property on October 13, 1977.
2. The action by the State of Oregon provides the state's authorization to the claimants to use the property subject to the standards in effect on October 13, 1977. On that date, the property was subject to applicable provisions of Goal 14, in effect at that time.
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 ORS 197.352(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 April 7, 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.