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 COMPENSATION UNDER ORS 197.352 (BALLOT MEASURE 37) OF Kenneth M. Mitchell, CLAIMANT	))))	FINAL ORDER CLAIM NO. M118699

Claimant: Kenneth M. Mitchell (the Claimant)

Property: Township 38S, Range 2E, Section 26, Tax lot 800, Jackson County (the Property)

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

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

ORDER

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

1. In lieu of compensation under ORS 197.352, the State of Oregon will not apply the following laws to Kenneth Mitchell's division of the 10-acre property into two 5-acre parcels or to his development of a dwelling on each parcel: applicable provisions of Goal 3, ORS 215 and OAR 660, division 33, enacted or adopted after October 30, 1978. These land use regulations will not apply to the claimant only to the extent necessary to allow him to use the property for the use described in this report, and only to the extent that use was permitted when he acquired the property on October 30, 1978.

2. The action by the State of Oregon provides the state's authorization to the claimant to use the property for the use described in this report, subject to the standards in effect on October 30, 1978. On that date, the property was subject to applicable provisions of Goal 3 and ORS 215 then in effect.

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 Director of the DLCD as a final order of DLCD and the Land Conservation and Development Commission under ORS 197.352, OAR 660-002-0010(8), and OAR 125, division 145, and by the Deputy Administrator for the State Services Division of the DAS as a final order of DAS under ORS 197.352, OAR 125, division 145, and ORS 293.

FOR DLCD AND THE LAND CONSERVATION AND DEVELOPMENT COMMISSION:

Lane Shetterly, Director
DLCD
Dated this 10th day of May, 2006.

FOR the DEPARTMENT OF ADMINISTRATIVE SERVICES:

Dugan Petty, Deputy Administrator
DAS, State Services Division
Dated this 10th day of May, 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[1], 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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[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.

ORS 197.35 (BALLOT MEASURE 37) CLAIM FOR COMPENSATION

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

May 10, 2006

STATE CLAIM NUMBER:	M118699
NAME OF CLAIMANT:	Kenneth M. Mitchell
MAILING ADDRESS:	14432 South Livesay Road Oregon City, Oregon 97045
PROPERTY IDENTIFICATION:	Township 38S, Range 2E, Section 26 Tax lot 800 Jackson County
OTHER INTEREST IN PROPERTY:	E.E. Bennett[1]
DATE RECEIVED BY DAS:	July 1, 2005
180-DAY DEADLINE:	May 16, 2006[2]

I. SUMMARY OF CLAIM

The claimant, Kenneth M. Mitchell, seeks compensation in the amount of $173,386 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 10-acre property into two 5-acre parcels and to develop a dwelling on each parcel. The subject property is located at 8004 Dead Indian Memorial Road, near Ashland, in Jackson County. (See claim.)

II. SUMMARY OF STAFF RECOMMENDATION

Based on the findings and conclusions set forth below, the Department of Land Conservation and Development (the department) has determined that the claim is valid. Department staff recommends that, in lieu of compensation, the requirements of the following state laws enforced by the Land Conservation and Development Commission (the Commission) or the department not apply to Kenneth Mitchell's division of the 10-acre property into two 5-acre parcels and to his development of a dwelling on each parcel: applicable provisions of Statewide Planning

[1] The nature of E.E. Bennett's interest in the subject property is not indicated in the claim. E.E. Bennett is not a claimant for the purposes of this Measure 37 claim.

[2] 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. Srvcs.*, 340 Or 117 (2006).

Goal 3 (Agricultural Lands), ORS 215 and Oregon Administrative Rules (OAR) 660, division 33, enacted or adopted after October 30, 1978. These laws will not apply to the claimant only to the extent necessary to allow him to use the property for the use described in this report, and only to the extent that use was permitted when he acquired the property on October 30, 1978. (See the complete recommendation in Section VI. of this report.)

III. COMMENTS ON THE CLAIM

Comments Received

On August 16, 2005, pursuant to OAR 125-145-0080, the Oregon Department of Administrative Services (DAS) provided written notice to the owners of surrounding properties. According to DAS, one written comment, evidence or information was received in response to the 10-day notice.

The comment does 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 letter 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, 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 July 1, 2005, for processing under OAR 125, division 145. The claim identifies Goal 3, ORS 197 and 215, OAR 660, division 33, and Jackson County zoning and planning requirements 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." ORS 197.352(11)(C) defines "owner" as "the present owner of the property, or any interest therein."

Findings of Fact

The claimant, Kenneth Mitchell, acquired the subject property on October 30, 1978, as reflected by a bargain and sale deed included with the claim. Jackson County Assessor's records submitted with the claim establish the claimant's current ownership.

Conclusions

The claimant, Kenneth Mitchell, is an "owner" of the subject property as that term is defined by ORS 197.352(11)(C) as of October 30, 1978.

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 indicates that the claimant desires to divide the 10-acre property into two 5-acre parcels and develop a dwelling on each parcel. It asserts that changes to ORS 197 and 215, OAR 660, division 33, Goal 3, and Jackson County planning and zoning prevent him from such development.[3]

The claim is based generally on Jackson 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

[3] In addition to Goal 3, applicable provisions of OAR 660, division 33, and ORS 215, the claim summarily cites ORS 197 as a land use regulation that restricts the use of the claimant's property. On its face, ORS 197 does not restrict the claimant's use of the subject property in a manner that reduces its fair market value. Absent an explanation as to how this law applies to and restricts the use of the claimant's property in a manner that reduces its fair market value, this statute is not addressed further in this report.

claimant's property is "agricultural land" as defined by Goal 3.[4] Goal 3 became effective on January 25, 1975, and required that agricultural lands as defined by the Goal be zoned EFU pursuant to ORS 215.

Current land use regulations, particularly ORS 215.263, 215.284 and 215.780 and OAR 660, division 33, enacted or adopted pursuant to Goal 3, prohibit the division of EFU-zoned land into parcels less than 80 acres 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 215.263 (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 215.283(1)(f). OAR 660-033-0130(4) (applicable to non-farm dwellings) became effective on August 7, 1993, and was amended to comply with ORS 215.284(4) on March 1, 1994. 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 property after the adoption of the statewide planning goals, but before the Commission acknowledged Jackson County's land use regulations to be in compliance with the statewide planning goals pursuant to ORS 197.250 and 197.251. Because the Commission had not acknowledged the county's plan and land use regulations when the claimant acquired the property on October 30, 1978, the statewide planning goals, and Goal 3 in particular, applied directly to the claimant's property when he acquired it.[5]

As adopted on January 25, 1975, Goal 3 required that agricultural land be preserved and zoned for EFU pursuant to ORS 215. The Goal 3 standard for land divisions involving property where the local zoning was not acknowledged required that the resulting parcels must be of a size that is "appropriate for the continuation of the existing commercial agricultural enterprise within the area." Further, ORS 215.263 (1973 edition) required that all divisions of land subject to EFU zoning comply with the legislative intent set forth in ORS 215.243 (Agricultural Land Use

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[4] Although claimant's property is predominantly Natural Resources Conservation Service Class VI soil, it has been determined to be "agricultural land" that is either suitable for farm use or necessary to allow farm use on nearby lands.

[5] 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 comprehensive plan and implementing 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 3 (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 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. *Forster v. Polk County,* 115 Or App 475 (1992) and *Kenagy v. Benton County,* 115 Or App 131 (1992).

Policy). Thus, the claimant's opportunity to divide the property when he acquired it in 1978 was limited to land divisions that were consistent with Goal 3, which required that the resulting parcels be (1) appropriate for the continuation of the existing commercial agricultural enterprise in the area and (2) shown to comply with the legislative intent set forth in ORS 215.

Under the Goal 3 standards in effect on October 30, 1978, farm dwellings were allowed if they were determined to be "customarily provided in conjunction with farm use" under ORS 215.213(1)(e) (1973 edition). Non-farm dwellings were subject to compliance with ORS 215.213(3) (1973 edition).

No information has been presented in the claim to establish that the claimant's desired division of the subject property into two 5-acre parcels complies with the "commercial" standard for farm parcels under Goal 3 or the standards for non-farm parcels under ORS 215.263 (1973 edition). Nor is there any information to establish that the claimant's desired development of two dwellings on the subject property satisfies the standards for farm or non-farm dwellings under ORS 215.213 (1973 edition).

Conclusions

The current zoning requirements, minimum lot size and dwelling standards established by Goal 3, ORS 215 and OAR 660, division 33, do not allow the claimant's desired division or development of the subject property. However, the claim does not establish whether or to what extent the claimant's desired use of the property complies with the standards for land divisions and development under ORS 215 and Goal 3 in effect when the claimant acquired the subject property on October 30, 1978.

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 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 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.

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 $173,386 as the reduction in the property's fair market value due to current regulations. This amount is based on comparative market analysis included with the claim.

Conclusions

As explained in Section V.(1) of this report, the claimant is Kenneth Mitchell who acquired the subject property on October 30, 1978. 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 and development of the property. The claimant estimates the reduction in value due to the restrictions to be $173,386.

Without an appraisal or other documentation and without verification of whether or to what extent the claimant's desired use of the property was allowed under the standards in effect when he 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.

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 Jackson County has implemented through its current EFU zone. With the exception of provisions of Goal 3 and ORS 215 in effect when the claimant acquired the property on October 30, 1978, these land use regulations were enacted or adopted after the claimant 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 with the exception of provisions of Goal 3 and ORS 215 in effect in 1978, the statutory, goal and rule restrictions on division and development of the claimant's property were not in effect when the claimant acquired it, and therefore, these laws are not exempt under ORS 197.352(3)(E). Provisions of Goal 3 and ORS 215 in effect when the claimant acquired the property in 1978 are exempt under ORS 197.352(E) and will continue to apply to the property.

Other laws in effect when the claimant acquired the 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 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 use that the claimant has identified. Similarly, this report only addresses the exemptions provided for 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 one or more 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 claimant's ability to divide the 10-acre property into two 5-acre parcels and to develop a dwelling on each parcel. The claim asserts that the laws enforced by the Commission or the department reduce the fair market value of the subject property by $173,386. 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 whether or to what extent the claimant's desired use 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 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 Kenneth Mitchell to use the subject property for a use permitted at the time he acquired the property on October 30, 1978.

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 Kenneth Mitchell's division of the 10-acre property into two 5-acre parcels or to his

development of a dwelling on each parcel: applicable provisions of Goal 3, ORS 215 and OAR 660, division 33, enacted or adopted after October 30, 1978. These land use regulations will not apply to the claimant only to the extent necessary to allow him to use the property for the use described in this report, and only to the extent that use was permitted when he acquired the property on October 30, 1978.

2. The action by the State of Oregon provides the state's authorization to the claimant to use the property for the use described in this report, subject to the standards in effect on October 30, 1978. On that date, the property was subject to applicable provisions of Goal 3 and ORS 215 then in effect.

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 April 25, 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.