

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. M118742
(BALLOT MEASURE 37) OF	)	
Donald W. Johnson, CLAIMANT	)	

Claimant: Donald W. Johnson (the Claimant)

Property: Township 39, Range 08, Section 26, Tax lots 1000, 1001 and 1002  
Township 40, Range 08, Section 04, Tax lot 400  
Josephine 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 Donald Johnson's division of the 39.28-acre property into seven approximately 5-acre parcels and to his division of the 160-acre property into 27 approximately 5-acre parcels: applicable provisions of Goal 4, ORS 215 and OAR 660, division 6, enacted or adopted after June 24, 1977. These land use regulations will not apply to the claimant only to the extent necessary to allow him to use the subject properties for the use described in this report, and only to the extent that use was permitted when he acquired the properties on June 24, 1977.
2. The action by the State of Oregon provides the state's authorization to the claimant to use the subject properties for the use described in this report, subject to the standards in effect on June 24, 1977. On that date, the properties were subject to the requirements of Goal 4 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 properties may not be used without a permit,

license or other form of authorization or consent, the order will not authorize the use of the properties 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 properties imposed by private parties.

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

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

FOR DLCD AND THE LAND CONSERVATION  
AND DEVELOPMENT COMMISSION:

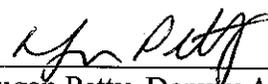
Lane Shetterly, Director



George Naughton, Deputy Director  
DLCD

Dated this 22<sup>nd</sup> day of May, 2006.

FOR the DEPARTMENT OF ADMINISTRATIVE  
SERVICES:



Dugan Petty, Deputy Administrator  
DAS, State Services Division

Dated this 22<sup>nd</sup> 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<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."

---

<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**

May 22, 2006

**STATE CLAIM NUMBER:** M118742

**NAME OF CLAIMANT:** Donald W. Johnson

**MAILING ADDRESS:** 511 Northwest Woodson Drive  
Grants Pass, Oregon 97526

**PROPERTY IDENTIFICATION:** Township 39, Range 08, Section 26  
Tax lots 1000, 1001 and 1002  
Township 40, Range 08, Section 04  
Tax lot 400  
Josephine County

**OTHER CONTACT INFORMATION:** Walter L. Cauble  
PO Box 398  
Grants Pass, Oregon 97528

**DATE RECEIVED BY DAS:** July 11, 2005

**180-DAY DEADLINE:** May 26, 2006<sup>1</sup>

**I. SUMMARY OF CLAIM**

The claimant, Donald Johnson, seeks compensation in the amount of \$3,659,000 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 claimant desires compensation or the right to divide one 39.28-acre property (composed of tax lots 1000, 1001 and 1002) into seven approximately 5-acre residential parcels, and to divide one 160-acre property (tax lot 400) into 27 approximately 5-acre residential parcels. The 39.28-acre property is located on Holland Loop Road and the 160-acre property is located on White Oak Drive, near Cave Junction, in Josephine 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

---

<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).

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 Donald Johnson's division of the 39.28-acre subject property into seven approximately 5-acre parcels and to his division of the 160-acre subject property into 27 approximately 5-acre parcels: applicable provisions of Statewide Planning Goal 4 (Forest Lands), ORS 215 and Oregon Administrative Rules (OAR) 660, division 6, enacted or adopted after June 24, 1977. These laws will not apply to the claimant only to the extent necessary to allow him to use the subject properties for the use described in this report, and only to the extent that use was permitted when he acquired the properties in 1977. (See the complete recommendation in Section VI of this report.)

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

#### **Comments Received**

On July 21, 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, eight written comments 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 a subject property may have on surrounding areas are generally not something that the department is able to consider in determining whether to waive a state law. If funds do become available to pay compensation, then such effects may become relevant in determining which claims to pay compensation for instead of waive a state law. (See 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 July 11, 2005, for processing under OAR 125, division 145. The claim identifies Josephine County's Forest Commercial (FC) zone 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 claimant, Donald Johnson, acquired the subject properties on June 24, 1977, as reflected by a warranty deed included with the claim. The Josephine County Assessor’s Office confirms the claimant’s current ownership of the subject properties.

### **Conclusions**

The claimant, Donald Johnson, is an “owner” of the subject properties as that term is defined by ORS 197.352(11)(C) as of June 24, 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 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 39.28-acre subject property and the 160-acre subject property into approximately 5-acre parcels suitable for homesites. The claim identifies Josephine County’s FC zone as restricting his desired use.

The claim is based generally on Josephine County’s current FC zone and the applicable provisions of state law that require such zoning. The claimant’s properties are zoned FC as required by Goal 4 in accordance with ORS 215 and OAR 660, division 6, because the claimant’s properties are “forest land” under Goal 4. Goal 4 became effective on January 25, 1975, and requires that forest land be zoned for forest use (see statutory and rule history under OAR 660-015-0000(4)). The forest land administrative rules (OAR 660, division 6) became effective on September 1, 1982, and ORS 215.705 to 215.755 and 215.780 became effective on November 4, 1993 (Chapter 792, Oregon Laws 1993). OAR 660-006-0026 and 660-006-0027 were amended on March 1, 1994, to implement those statutes.

The claimant acquired the subject properties after the adoption of the statewide planning goals but before the Commission acknowledged the Josephine 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 subject properties on June 24, 1977, the statewide planning goals, and Goal 4 in particular, applied directly to the claimant's properties when he acquired them.<sup>2</sup>

Goal 4 went into effect on January 25, 1975, "to conserve forest lands for forest uses" and required, "Lands suitable for forest uses shall be inventoried and designated as forest lands. Existing forest land uses shall be protected unless proposed changes are in conformance with the comprehensive plan." Those forest uses were defined as follows: "(1) the production of trees and the processing of forest products; (2) open space, buffers from noise, and visual separation of conflicting uses; (3) watershed protection and wildlife and fisheries habitat; (4) soil protection from wind and water; (5) maintenance of clean air and water; (6) outdoor recreational activities and related support services and wilderness values compatible with these uses; and (7) grazing land for livestock."

In general, Goal 4 required local land use regulations to "conserve forestlands for forest uses." Specifically, Goal 4 only allowed land divisions that would protect commercial forest lands for commercial forest uses.

No information has been presented in the claim to establish that the claimant's desired division of the subject properties, totaling 199.28 acres, into 34 parcels complies with the Goal 4 standards in place when he acquired the properties in 1977.

### Conclusions

The current zoning requirements, minimum lot size and dwelling standards established by Goal 4, ORS 215.705 to 215.755 and 215.780 and OAR 660-006-0026 and 660-006-0027 were all enacted or adopted after the claimant acquired the subject properties in 1977 and do not allow the claimant's desired division of the properties. However, the claim does not establish whether or to what extent the claimant's desired use of the subject properties complies with the standards for land divisions under Goal 4 in effect when the claimant acquired the properties on June 24, 1977.

This report addresses only those state laws that are identified in the claim, or that the department is certain apply to the subject properties, based on the uses that the claimant has identified.

---

<sup>2</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 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 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 claimant's use of the subject properties, and that may continue to apply to the claimant's use of the properties, 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 properties 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 \$796,600 as the reduction in the 39.28-acre subject property's fair market value due to current regulations, and \$2,862,400 as the reduction in the 160-acre subject property's fair market value due to current regulations. This amount is based on an estimate of the current value of five-acre parcels on the two properties, less the cost of development.

#### **Conclusions**

As explained in Section V.1 of this report, the claimant is Donald Johnson who acquired the subject properties on June 24, 1977. Under ORS 197.352, the claimant is due compensation for land use regulations that restrict the use of the subject properties in a manner that reduces the 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 properties restrict the desired division of the properties. The claimant estimates the reduction in value due to the restrictions to be \$796,600 for the 39.28-acre property and \$2,862,400 for the 160-acre property.

Without an appraisal or other documentation, and without verification of whether or the extent to which the claimant's desired use of the subject properties was allowed under the standards in effect when he acquired the properties, 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 properties 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 properties, including applicable provisions of Goal 4, ORS 215 and OAR 660, division 6, which Josephine

County has implemented through its current FC zone. With the exception of provisions of Goal 4 in effect on June 24, 1977, these laws were not in effect when the claimant acquired the subject properties.

### **Conclusions**

Without a specific development proposal for the subject properties, it is not possible for the department to determine all the laws that may apply to a particular use of the properties, 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 division of the subject properties are not exempt under ORS 197.352(3)(E) to the extent they were enacted or adopted after the claimant acquired the properties. Provisions of Goal 4 in effect when the claimant acquired the subject properties in 1977 are exempt under ORS 197.352(3)(E) and will continue to apply to the properties.

Other laws in effect when the claimant acquired the subject properties are exempt under ORS 197.352(3)(E) and will also continue to apply to the claimant's use of the properties. In addition, the department notes that ORS 215.730 and OAR 660, division 6, include standards for siting dwellings in forest zones. These provisions include fire protection standards for dwellings and for surrounding forest lands. ORS 197.352(3)(B) specifically exempts regulations "restricting or prohibiting activities for the protection of public health and safety, such as fire and building codes. . . ." Accordingly, siting standards for dwellings in forest zones in ORS 215.730 and OAR 660, division 6, are exempt under ORS 197.352(3)(B).

There may be other laws that continue to apply to the claimant's use of the subject properties 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 properties 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. 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 properties 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 properties.

## **VI. FORM OF RELIEF**

ORS 197.352(1) provides for payment of compensation to an owner of private real property if the Commission or the department has enforced laws that restrict the use of the property in a manner that reduces its fair market value. In lieu of compensation, the department may choose to not apply the law in order to allow the present owner to carry out a use of the property permitted at the time the current owner acquired the property. The Commission, by rule, has directed that if the department determines a claim is valid, the Director of the department must

provide only non-monetary relief unless and until funds are appropriated by the legislature to pay claims.

### **Findings of Fact**

Based on the findings and conclusions set forth in this report, laws enforced by the Commission or the department restrict the claimant's ability to divide the 39.28-acre subject property into seven approximately 5-acre parcels and the 160-acre subject property into 27 approximately 5-acre parcels. The claim asserts that the laws enforced by the Commission or the department reduce the fair market value of the 39.28-acre property by \$796,000 and of the 160-acre property by \$2,862,400. However, because the claim does not provide an appraisal or other specific documentation establishing how the specified restrictions reduce the fair market value of the subject properties, and without verification of whether or the extent to which the claimant's desired use of the properties was allowed under the standards in effect when he acquired them, 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 properties 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 Donald Johnson to use the subject properties for a use permitted at the time he acquired the properties on June 24, 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 Donald Johnson's division of the 39.28-acre property into seven approximately 5-acre parcels and to his division of the 160-acre property into 27 approximately 5-acre parcels: applicable provisions of Goal 4, ORS 215 and OAR 660, division 6, enacted or adopted after June 24, 1977. These land use regulations will not apply to the claimant only to the extent necessary to allow him to use the subject properties for the use described in this report, and only to the extent that use was permitted when he acquired the properties on June 24, 1977.
2. The action by the State of Oregon provides the state's authorization to the claimant to use the subject properties for the use described in this report, subject to the standards in effect on June 24, 1977. On that date, the properties were subject to the requirements of Goal 4 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 properties may not be used without a permit, license or other form of authorization or consent, the order will not authorize the use of the properties 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 properties imposed by private parties.

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

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

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

The department issued its draft staff report on this claim on May 3, 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.