

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. M121424
(BALLOT MEASURE 37) OF	)	
David Horstkotte, CLAIMANT	)	

Claimant: David Horstkotte (the Claimant)

Property: Township 3S, Range 8½E , Section 23, Tax lot 4700, Clackamas 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 David Horstkotte's division of the 0.23-acre property into two parcels for residential development: applicable provisions of Goal 14 and OAR 660-004-0040, adopted after June 22, 2004. The department acknowledges that the relief to which David Horstkotte is entitled under ORS 197.352 will not allow him to use the subject property in the manner set forth in the claim.
2. The action by the State of Oregon provides the state's authorization to David Horstkotte to use the property subject to the standards in effect on June 22, 2004. At that time, the property was subject to applicable provisions of Goal 14 and OAR 660-004-0040 currently 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 claimant David Horstkotte 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

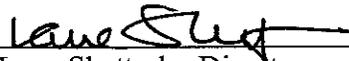
decision, a "permit" as defined in ORS 215.402 or 227.160, other permits or authorizations from local, state or federal agencies and restrictions on the use of the subject property imposed by private parties.

4. Any use of the subject property by claimant David Horstkotte 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).

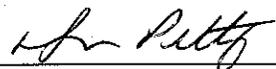
5. Without limiting the generality of the foregoing terms and conditions, in order for claimant David Horstkotte to use the subject property, it may be necessary for him to obtain a decision under ORS 197.352 from a city and/or county and/or metropolitan service district that enforces land use regulations applicable to the property. Nothing in this order relieves David Horstkotte 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 David Horstkotte.

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 23<sup>rd</sup> day of May, 2006.

FOR the DEPARTMENT OF ADMINISTRATIVE  
SERVICES:

  
\_\_\_\_\_  
Dugan Petty, Deputy Administrator  
DAS, State Services Division  
Dated this 23<sup>rd</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.”

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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.

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. M 121424  
(BALLOT MEASURE 37) OF )  
Fred Horstkotte Jr., CLAIMANT )

Claimant: Fred Horstkotte Jr. (the Claimant)

Property: Township 3S, Range 8½E , Section 23, Tax lot 4700, Clackamas County  
(the property)

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

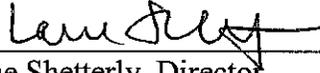
Claimant submitted the Claim to the State of Oregon under ORS 197.352. Under OAR 125-145-0010 *et seq.*, the Department of Administrative Services (DAS) referred the Claim to the Department of Land Conservation and Development (DLCD) as the regulating entity. This order is based on the record herein, 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 denied as to laws administered by DLCD and the Land Conservation and Development Commission (LCDC) for the reasons set forth in the DLCD Report.

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

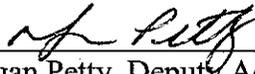
FOR DLCD AND THE LAND  
CONSERVATION AND DEVELOPMENT  
COMMISSION:



Lane Shetterly, Director  
DLCD

Dated this 23<sup>rd</sup> day of May, 2006.

FOR the DEPARTMENT OF  
ADMINISTRATIVE SERVICES:



Dugan Petty, Deputy Administrator  
DAS, State Services Division

Dated this 23<sup>rd</sup> day of May, 2006.

**NOTICE OF RIGHT TO APPEAL OR OTHER JUDICIAL RELIEF**

You are entitled, or may be entitled, to the following judicial remedies:

1. Judicial review under ORS 183.484: Judicial review under ORS 183.484 may be obtained by filing a petition for review within 60 days from the service of this order. A petition for judicial review under ORS 183.484 may be filed in the Circuit Court for Marion County or the Circuit Court in the county in which you reside.
2. A cause of action under ORS 197.352 (Measure 37 (2004)): If a land use regulation continues to apply to the subject property more than 180 days after the present owner of the property has made written demand for compensation under ORS 197.352<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)

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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**

May 23, 2006

**STATE CLAIM NUMBER:** M121424

**NAMES OF CLAIMANTS:** Fred Horstkotte Jr. and David Horstkotte

**MAILING ADDRESS:** 1760 Southwest West Point Court  
Portland, Oregon 97201

**PROPERTY IDENTIFICATION:** Township 3S, Range 8½E , Section 23  
Tax lot 4700  
Clackamas County

**OTHER CONTACT INFORMATION:** David Horstkotte  
6129 Southwest Salmon Street  
Portland, Oregon 97221

John Pinkstaff  
Ramis Crew Corrigan, LLP  
1727 Northwest Hoyt Street  
Portland, Oregon 97209

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

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

**I. SUMMARY OF CLAIM**

The claimants, Fred and David Horstkotte, seek compensation in the amount of \$87,867 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 0.23-acre property into two parcels for residential development. The subject property is located on Third Street, Government Camp, in Clackamas 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 for David Horstkotte.

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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).

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 David Horstkotte's division of the 0.23-acre property into two 50 by 100 foot parcels for residential development: applicable provisions of Statewide Planning Goal 14 (Urbanization) and Oregon Administrative Rules (OAR) 660-004-0040, adopted after June 22, 2004. The department acknowledges that the relief to which David Horstkotte is entitled under ORS 197.352 will not allow him to use the subject property in the manner set forth in the claim. (See the complete recommendation in Section VI. of this report.)

Based on the preliminary findings and conclusions set forth below, the department has determined that this claim is not valid for Fred Horstkotte because he has not established his current ownership of the subject property. (See the complete recommendation in Section VI of this report.)

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

#### **Comments Received**

On August 26, 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, no written comments, evidence or information were received in response to the 10-day notice.

### **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 15, 2005, for processing under OAR 125, division 145. The claim identifies provisions of the Clackamas County code and "state statutes, statewide planning goals, and administrative rules" 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 ORS 197.352. ORS 197.352(11)(C) defines “owner” as “the present owner of the property, or any interest therein.”

### **Findings of Fact**

Claimant Fred Horstkotte acquired the subject property on October 30, 1945, as reflected by a warranty deed included with the claim. On June 22, 2004, Fred Horstkotte conveyed the subject property to his son, claimant David Horstkotte, by a bargain and sale deed included in the claim. Subsequently, on March 8, 2005, Fred Horstkotte executed another document to “correct vesting of title.” That document asserts that the 2004 deed should have left Fred Horstkotte with a 10 percent interest in the parcel. The “correction” document was signed only by Fred Horstkotte. A 2004-05 tax statement submitted with the claim lists David Horstkotte as the current owner.

### **Conclusions**

David Horstkotte is an “owner” of the subject property as that term is defined by ORS 197.352(11)(C). Fred Horstkotte is not a current owner of the property. Fred Horstkotte did not own an interest in the parcel in March 2005 when he signed the document to “correct the vesting of title.” Because Fred Horstkotte had no legal or equitable interest in the property on March 8, 2005, a document purporting to unilaterally convey an interest in the property back to himself on that date cannot convey any interest in the subject property.<sup>2</sup>

Claimant Fred Horstkotte is a “family member” of David Horstkotte, as that term is defined by ORS 197.352(11)(A), as of October 30, 1945.

### **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.

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<sup>2</sup> Had the document to “correct the vesting of title” been executed by the then owner of the subject property, David Horstkotte, Fred Horstkotte would have had a current ownership interest in the property as of March 8, 2005, which would not have entitled him to the relief sought in this claim.

## **Findings of Fact**

The claim indicates that the claimants desire to divide the 0.23-acre parcel into two parcels and to develop a dwelling on each parcel. They assert that various provisions of the Clackamas County code and related state statutes and regulations prevent them from developing the parcels.<sup>3</sup>

The claim is based generally on Clackamas County's current Recreational Residential zone, Hoodland Residential zone and the applicable provisions of state law that require such zoning.

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>4</sup> the Commission amended Goal 14 and adopted OAR 660-004-0040 (Application of Goal 14 to Rural Residential Areas), which was effective on October 4, 2000.

OAR 660-004-0040 states that the area of any new lots or parcels in a rural residential zone in effect on October 4, 2000, must be at least two acres. If a county rural residential zone specifies a minimum lot or parcel size smaller than two acres, the area of any new lot or parcel shall equal or exceed two acres (OAR 660-004-0040(5)(b) and (7)(d)). The creation of any new lot or parcel smaller than two acres in a rural residential zone is considered an urban use, and may be created only if an exception to Goal 14 is taken (OAR 660-004-0040(7)(a)). Some relief from these provisions is available for lots or parcels having more than one permanent habitable dwelling pursuant to OAR 660-004-0040(7)(h). Because Clackamas County's Rural Residential zone was in effect on October 4, 2000, and allows a lot or parcel size less than two acres, OAR 660-004-0040 requires that all new lots or parcels have a minimum lot or parcel size of two acres or more, unless an exception to Goal 14 is taken.

The claimants' family first acquired the subject property in 1945, prior to the adoption of the statewide planning goals and their implementing statutes and rules. No county zoning applied to the subject property in 1945.

## **Conclusions**

The minimum lot size requirements for rural residential lots or parcels established by Goal 14 and OAR 660-004-0040 were adopted since the claimants' family acquired the subject property in 1945 and do not allow the desired division of the property.

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<sup>3</sup> The claimants have summarily referenced numerous state laws as applicable to this claim but do not establish how each of the laws either applies to the subject property or restricts its use in a manner that reduces its fair market value. On their face, most of the regulations generally cited in the claim either do not apply to the subject property or do not restrict the use of the subject property. This report addresses only those regulations that the department finds are applicable to and restrict the claimants' use of the subject property, based on the claimants' asserted desired use.

<sup>4</sup> *1000 Friends of Oregon v. LCDC (Curry County)*, 301 Or 447 (1986).

### **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 \$87,867 as the reduction in the subject property’s fair market value due to current regulations. This amount is based on the claimants’ own estimate.

#### **Conclusions**

As explained in Section V.(1) of this report, the current owner is David Horstkotte whose family acquired the subject property in 1945. Under ORS 197.352, this claimant is due compensation for land use regulations that restrict the use of the 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 claimants’ family acquired the subject property restrict the desired division of the property. The claimants estimate the reduction in value due to the restrictions to be \$87,867.

Without an appraisal or other documentation, it is not possible to substantiate the specific dollar amount the claimants demand for compensation. Nevertheless, based on the submitted information, the department determines that it is more likely than not that the fair market value of the subject property has been reduced to some extent as a result of land use regulations enforced by the Commission or the department since the claimants’ family acquired the property.

### **4. Exemptions Under ORS 197.352(3)**

ORS 197.352 does not apply to certain land use regulations. In addition, under ORS 197.352, certain types of laws are exempt from ORS 197.352.

#### **Findings of Fact**

The claim is based on state land use regulations that restrict the use of the subject property relative to the uses permitted when the claimants’ family acquired the property, including applicable provisions of Goal 14 and OAR 660-004-0040, which Clackamas County has implemented through its current Recreational Residential zone. Both of these land use regulations were adopted after the claimants’ family acquired the subject property.

#### **Conclusions**

It appears that none of the general statutory, goal and rule restrictions on residential division of the subject property were in effect when the claimants’ family acquired the property on October 30, 1945. As a result, these laws are not exempt under ORS 197.352(3)(E). Laws in effect when the claimants’ family acquired the subject property are exempt under ORS 197.352(3)(E) and do not provide a basis for compensation. In addition, other land use laws enacted or adopted for a purpose set forth in ORS 197.352(3)(A) to (D) are also exempt and would not provide a basis for compensation.

## **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 David Horstkotte's ability to divide the 0.23-acre property into two 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 \$87,867. However, because the claim does not provide an appraisal or other specific documentation for how the specified restrictions reduce the fair market value of the subject property, a specific amount of compensation cannot be determined. Nevertheless, based on the record for this claim, the department acknowledges that the laws on which the claim is based may 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 Horstkotte to use the subject property for a use permitted at the time he acquired the property on June 22, 2004.

At the time David Horstkotte acquired the subject property, it was zoned Recreational Residential by Clackamas County and subject to the lot size and dwelling standards currently in effect, as described in Section V.(2) of this report.

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 claimant David Horstkotte 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. David Horstkotte should be aware that the less information he has provided to the department in his 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.

### **Conclusions**

Based on the record before the department, claimant Fred Horstkotte has not established that he is entitled to relief under ORS 197.352(1), as a result of land use regulations enforced by the Commission or the department because he is not a current owner of the subject property. Therefore, the department recommends that this claim be denied as to Fred Horstkotte.

Based on the record, the department further recommends that claim be approved as to David Horstkotte, 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 Horstkotte's division of the 0.23-acre property into two parcels for residential development: applicable provisions of Goal 14 and OAR 660-004-0040, adopted after June 22, 2004. The department acknowledges that the relief to which David Horstkotte is entitled under ORS 197.352 will not allow him to use the subject property in the manner set forth in the claim.
2. The action by the State of Oregon provides the state's authorization to David Horstkotte to use the property subject to the standards in effect on June 22, 2004. At that time, the property was subject to applicable provisions of Goal 14 and OAR 660-004-0040 currently 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 claimant David Horstkotte 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 claimant David Horstkotte 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 claimant David Horstkotte 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 David Horstkotte 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 David Horstkotte.

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

The department issued its draft staff report on this claim on May 9, 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.