

BEFORE THE DEPARTMENT OF ADMINISTRATIVE SERVICES AND  
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. M122202
(BALLOT MEASURE 37) OF	)	
James and Shirley Petersen, CLAIMANTS	)	

Claimants: James and Shirley Petersen (the Claimants)

Property: Township 8S, Range 1E, Section 10, Tax lot 200, Marion 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 Shirley Petersen's division of the 68.6-acre property into one 12-acre parcel and one 56.6-acre parcel: applicable provisions of Goals 3 and 4, ORS 215 and OAR 660, divisions 6, and 33, enacted or adopted after May 13, 1988. These land use regulations will not apply to the claimants only to the extent necessary to allow them to use the subject property for the use described in this report, and only to the extent that use was permitted when they acquired the property on May 13, 1988.
2. The action by the State of Oregon provides the state's authorization to the claimants to use the property for the use described in this report, subject to the standards in effect on May 13, 1988. On that date, the property was subject to compliance with Marion County's acknowledged EFU and TC zones, and the applicable provisions of Goals 3 and 4, ORS 215 and OAR 660, 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 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 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 county 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 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 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



Cora R. Parker, Deputy Director  
DLCD

Dated this 17<sup>th</sup> day of July, 2006.

FOR the DEPARTMENT OF ADMINISTRATIVE  
SERVICES:



David Hartwig, Administrator  
DAS, State Services Division

Dated this 17<sup>th</sup> day of July, 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**

July 17, 2006

**STATE CLAIM NUMBER:** M122202

**NAMES OF CLAIMANTS:** James and Shirley Petersen

**MAILING ADDRESS:** 10783 Wagner Road SE  
Lyons, Oregon 97358

**PROPERTY IDENTIFICATION:** Township 8S, Range 1E, Section 10  
Tax lot 200  
Marion County

**DATE RECEIVED BY DAS:** September 6, 2005

**180-DAY DEADLINE:** July 22, 2006<sup>1</sup>

**I. SUMMARY OF CLAIM**

The claimants, James and Shirley Petersen, seek compensation in the amount of \$380,000 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 68.6-acre property into one 12-acre and one 56.6-acre parcel. The subject property is located at 3995 Silver Ridge Road SE, near Sublimity, in Marion 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 Shirley Petersen's division of the 68.6-acre property into one 12-acre parcel and one 56.6-acre parcel: applicable provisions of Statewide Planning Goals 3 (Agricultural Lands) and 4 (Forest Lands), ORS 215 and Oregon Administrative Rules (OAR) 660, divisions 6, and 33, enacted or adopted after May 13, 1988. These laws will not apply to the claimants only to the extent necessary to allow them to use the subject property for the use described in this report, and only to the extent that use was permitted when they acquired the property on May 13, 1988. (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 September 12, 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 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 September 6, 2005, for processing under OAR 125, division 145. The claim identifies the 80-acre minimum lot size requirements under House Bill 3661 (ORS 215.780) 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**

The claimants, James and Shirley Petersen, acquired the subject property on May 13, 1988, as reflected by a land sale contract and fulfillment warranty deed included with the claim. A June 30, 2005, tax statement and an August 23, 2005, lot book report submitted with the claim establish the claimants' current ownership of the subject property.

## **Conclusions**

The claimants, James and Shirley Petersen, are "owners" of the subject property as that term is defined by ORS 197.352(11)(C), as of May 13, 1988.

## **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 the claimants desire to divide the subject property into one 12-acre parcel and one 56.6-acre parcel, and state land use regulations prevent the desired division.<sup>2</sup>

The claim is based generally on Marion County's current farm and forest zones and the applicable provisions of state law that require such zoning. Part of the claimants' property is zoned Exclusive Farm Use (EFU) and part is zoned Timber Conservation (TC). The subject property is zoned EFU and TC in accordance with Goals 3 and 4, ORS 215 and OAR 660, divisions 6, and 33, because the claimants' property is a combination of "agricultural land" and "forest land" as defined by Goals 3 and 4.<sup>3</sup>

Goal 3 became effective on January 25, 1975, and requires that agricultural lands as defined by the goal be zoned EFU pursuant to ORS 215. Current land use regulations pertaining to the EFU-zoned land, particularly ORS 215.263 and 215.780 and OAR 660, division 33, enacted or adopted pursuant to Goal 3, were enacted or adopted after the claimants acquired the subject property in 1988 and prohibit the division of EFU-zoned land into parcels less than 80 acres. 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.

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<sup>2</sup> A July 18, 2005, letter included with the claim clarifies that the claimants wish to sell the 12-acre parcel to their son, including the existing dwelling on that portion of the property, and to "keep the balance of [the] property to enjoy the woods and park like setting. . . ." The claim does not indicate a desire to develop any additional dwellings on the subject property.

<sup>3</sup> The claimants' property is "agricultural land" because it contains Natural Resources Conservation Service Class I-IV soils. The claimants' property is also "forest land" because it contains land suitable for forest use as described by Goal 4.

Current minimum lot size standards pertaining to TC-zoned land are established by Goal 4, ORS 215.780 and OAR 660, division 6. 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)). ORS 215.780 establishes an 80-acre minimum size for the creation of new lots or parcels in forest zones and became effective on November 4, 1993 (Chapter 792, Oregon Laws 1993). OAR 660, division 6, became effective on September 1, 1982. The administrative rule addressing minimum parcel size (OAR 660-006-0026) became effective on February 5, 1990, and was amended to implement Chapter 792, Oregon Laws 1993 on March 1, 1994.

The claimants acquired the subject property on May 13, 1988. At that time, the property was “split zoned” and subject to Marion County’s acknowledged EFU and TC zones.<sup>4</sup> When the claimants acquired the subject property, the desired division of the property would have been governed by the county’s acknowledged EFU and TC zones then in effect, based on the applicable provisions of Goals 3 and 4, ORS 215 and OAR 660.<sup>5</sup> With regard to the EFU-zoned portion of the subject property, in 1988, ORS 215.263 (1987 edition) required that divisions of land in EFU zones be “appropriate for the continuation of the existing commercial agricultural enterprise within the area” or not smaller than the minimum size in the county’s acknowledged plan. There were no statutory regulations directly applicable to the TC-zoned portion of the property in 1988.

The claim does not establish whether or to what extent the claimants’ desired use of the subject property complies with the standards for land divisions in Marion County’s acknowledged EFU and TC zones in effect when the claimants acquired the property on May 13, 1988.

### **Conclusions**

Current zoning requirements and minimum lot size standards established by Goals 3 and 4, ORS 215 and OAR 660, divisions 6, and 33, were enacted or adopted after the claimants acquired the subject property in 1988 and do not allow the claimants’ desired division of the property. However, the claim does not establish whether or to what extent the claimants’ desired use of the subject property complies with the standards for land divisions under Marion County’s EFU and TC zones and the applicable provisions of ORS 215 in effect when the claimants acquired the property on May 13, 1988.

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. 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 land division, or a

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<sup>4</sup> Marion County’s EFU and TC zones were acknowledged by the Commission for compliance with Goal 3 on June 10, 1982, and Goal 4 on October 19, 1981.

<sup>5</sup> After the county’s comprehensive plan and land use regulations were acknowledged by the Commission as complying with the statewide planning goals, the goals and implementing rules no longer applied directly to individual 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).

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 the land use regulation(s) (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 \$380,000 as the reduction in the subject property’s fair market value due to the regulations. According to the claim, this amount is based on the subject property’s assessed value and estimated “retail sales of two lots vs. one.”

#### **Conclusions**

As explained in Section V.(1) of this report, the claimants are James and Shirley Petersen who acquired the subject property on May 13, 1988. Under ORS 197.352, the claimants are due compensation for land use regulations that restrict the use of the subject property and have the effect of reducing its fair market value. Based on the findings and conclusions in Section V.(2) of this report, laws enacted or adopted since the claimants acquired the subject property restrict the claimants’ desired use of the property. The claimants estimate that the effect of the regulations on the fair market value of the subject property is a reduction of \$380,000.

Without an appraisal or other relevant evidence, and without verification of whether or the extent to which the claimants’ desired use of the subject property was allowed under the standards in effect when they acquired the property, it is not possible to substantiate the specific dollar amount by which the land use regulations have reduced the fair market value of the property. Nevertheless, based on the evidence in the record for this claim, the department determines that the fair market value of the subject property has been reduced to some extent as a result of land use regulations enforced by the Commission or the department.

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

ORS 197.352 does not apply to certain land use regulations. In addition, under ORS 197.352(3), certain types of laws are exempt from ORS 197.352.

#### **Findings of Fact**

The claim is based on state land use regulations that restrict the use of the subject property, including applicable provisions of Goals 3 and 4, ORS 215 and OAR 660, divisions 6, and 33, which Marion County has implemented through its current EFU and TC zones. With the exception of amendments to ORS 215 and OAR 660 enacted or adopted after May 13, 1988, these land use regulations were in effect when the claimants acquired the subject property.

## **Conclusions**

Without a specific development proposal for the subject property, it is not possible for the department to determine all the laws that may apply to a particular use of the property, or whether those laws may fall under one or more of the exemptions under ORS 197.352. It appears that the general statutory, goal and rule restrictions on divisions of the subject property are not exempt under ORS 197.352(3)(E) only to the extent they were enacted or adopted after the claimants acquired the property on May 13, 1988. Provisions of and Marion County's EFU and TC zones, Goals 3 and 4, ORS 215 and OAR 660 in effect when the claimants acquired the subject property in 1988 are exempt under ORS 197.352(3)(E) and will continue to apply to the 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 subject property until there is a specific proposal for that use. When the claimants seek a land division, or a building or development permit to carry out a specific use, it may become evident that other state laws apply. Some of these laws may be exempt under ORS 197.352(3)(A) to (D).

This report addresses only those state laws that are identified in the claim, or that the department is certain apply to the subject property, based on the uses that the 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 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 present 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' desired use of the subject property. The claim asserts that existing state land use regulations enforced by the Commission or the department have the effect of reducing the fair market value of the subject property by \$380,000. However, because the claim does not provide an appraisal or other relevant evidence demonstrating that the land use regulations described in Section V.(2) reduce the fair market value of the subject property, a

specific amount of compensation cannot be determined. In order to determine a specific amount of compensation due for this claim, it would also be necessary to verify whether or the extent to which the claimants' desired use of the property was allowed under the standards in effect when they acquired the property. Nevertheless, based on the record for this claim, the department has determined that the laws on which the claim is based 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 Shirley Petersen to use the subject property for a use permitted at the time they acquired the property on May 13, 1988.

### **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 Shirley Petersen's division of the 68.6-acre property into one 12-acre parcel and one 56.6-acre parcel: applicable provisions of Goals 3 and 4, ORS 215 and OAR 660, divisions 6, and 33, enacted or adopted after May 13, 1988. These land use regulations will not apply to the claimants only to the extent necessary to allow them to use the subject property for the use described in this report, and only to the extent that use was permitted when they acquired the property on May 13, 1988.
2. The action by the State of Oregon provides the state's authorization to the claimants to use the property for the use described in this report, subject to the standards in effect on May 13, 1988. On that date, the property was subject to compliance with Marion County's acknowledged EFU and TC zones, and the applicable provisions of Goals 3 and 4, ORS 215 and OAR 660, 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 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 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 county 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 June 28, 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.