

**ORS 197.352 (BALLOT MEASURE 37) CLAIM FOR COMPENSATION**

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

July 18, 2006

**STATE CLAIM NUMBER:** M122260

**NAMES OF CLAIMANTS:** Diane and Andrew Ulven

**MAILING ADDRESS:** 10313 Silverton Road NE  
Silverton, Oregon 97381

**PROPERTY IDENTIFICATION:** Township 7S, Range 1W, Section 5  
Tax lot 1900  
Marion County

**OTHER CONTACT INFORMATION:** Robert L. Engle  
610 Glatt Circle  
Woodburn, Oregon 97071

**DATE RECEIVED BY DAS:** September 9, 2005

**180-DAY DEADLINE:** July 25, 2006<sup>1</sup>

**I. SUMMARY OF CLAIM**

The claimants, Diane and Andrew Ulven, seek compensation in the amount of \$190,725 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 develop a dwelling on the 24.91-acre subject property. The subject property is located at 10963 Selah Springs Drive NE, near Silverton, 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 the claimants' development of a dwelling on the 24.91-acre property: applicable provisions of Statewide Planning Goal 3 (Agricultural Lands), ORS 215 and Oregon Administrative Rules (OAR) 660, division 33, enacted or adopted after the claimants acquired

---

<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).

the subject property. 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 Diane Ulven acquired the property on August 12, 1988, and when Andrew Ulven acquired the property on October 20, 1993. (See the complete recommendation in Section VI of this report.)

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

#### **Comments Received**

On October 7, 2005, pursuant to OAR 125-145-0080, the Oregon Department of Administrative Services (DAS) provided written notice to the owners of surrounding properties. According to DAS, two written comments were received in response to the 10-day notice. The comments are relevant to whether the restriction of the claimants' use of the subject property reduces the fair market value of the property. The comments have been considered by the department in preparing this report. (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 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 9, 2005, for processing under OAR 125, division 145. The claim identifies Marion County's Exclusive Farm Use (EFU) 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 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 Diane Ulven acquired the subject property on August 12, 1988, as reflected by the warranty deed included with the claim. Claimant Andrew Ulven acquired an interest in the subject property from Diane Ulven on October 20, 1993, as reflected by the bargain and sale deed included with the claim.

According to an affidavit included with the claim, the claimants’ family acquired the subject property in 1902, and the property has been “held in family name since a land patent grant by Andrew Johnson, President in 1892.”

The Marion County Assessor’s Office confirms the claimants’ current ownership of the subject property.

### **Conclusions**

Claimant Diane Ulven is an “owner” of the subject property as that term is defined by ORS 197.352(11)(C), as of August 12, 1988, and claimant Andrew Ulven is an “owner” as of October 20, 1993. The subject property has been owned by a “family member” as that term is defined by ORS 197.352(11)(A) since the claimants’ family first acquired the property in 1902.

### **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 develop the 24.91-acre subject property with a single-family dwelling, and Marion County’s EFU zone and OAR 660, division 33, prohibit that desired use.<sup>2</sup>

---

<sup>2</sup> The claim also explains:

In 1988 or 89, while my family an I were clearing brush and blackberries from the property, we accidentally destroyed the residence as a result of a fire in a burn pile that got away from us. We had always intended to upgrade and remodel that existing residence. After the fire we planned to replace the residence with a residence similar to the one in which my aunt has resided. . . . We were unaware of the one year replacement requirement set forth in Oregon’s law for a fire

The claim is based generally on Marion County's current EFU zone and the applicable provisions of state law that require such zoning. The claimants' property is zoned EFU as required by Goal 3, in accordance with ORS 215 and OAR 660, division 33, because the claimants' property is "agricultural land" as defined by Goal 3.<sup>3</sup> 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 215.284 and OAR 660, division 33, enacted or adopted pursuant to Goal 3, establish standards for development of dwellings on existing or proposed parcels on EFU-zoned land. 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 (HB) 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 and -0130.) Pursuant to HB 3326, these rules expanded the Commission's authority to allow the partition of EFU-zoned property into lots or parcels smaller than the minimum size established under ORS 215.780 for the purpose of siting non-farm dwellings.

The claimants' family first acquired the subject property in 1902, prior to the adoption of the statewide planning goals and their implementing statutes and regulations. No county zoning applied to the subject property in 1902.

### **Conclusions**

The current zoning requirements and dwelling standards established by Goal 3, ORS 215 and OAR 660, division 33, were all enacted or adopted after the claimants' family acquired the subject property. These laws restrict the use of the subject property relative to the uses allowed when the claimants' family acquired the property.

### **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 \$190,725 as the reduction in the subject property's fair market value due to the regulations that restrict the claimants' desired use of the property. This amount

---

destroyed residence and therefore did not apply for a replacement permit within that time. When we did make an application we were told that it was too late.

<sup>3</sup> The claimants' property is "agricultural land" because it contains Natural Resources Conservation Service Class I-IV soils.

is based on the value of the subject property as a buildable parcel and the values of comparable properties in the vicinity that have sold in the past year.

### **Conclusions**

As explained in Section V.(1) of this report, the claimants are Diane and Andrew Ulven whose family acquired the property in 1902. 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' family acquired the subject property may 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 \$190,725.

Without an appraisal or other documentation, it is not possible to substantiate the specific dollar amount by which the land use regulations have reduced the fair market value of the subject 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 relative to the uses permitted when the claimants' family acquired the subject property, including applicable provisions of Goal 3, ORS 215 and OAR 660, division 33, which Marion County has implemented through its current EFU zone. All of these land use regulations were enacted or adopted after the claimants' family acquired the subject property.

### **Conclusions**

It appears that none of the general statutory, goal and rule restrictions on residential development of the subject property were in effect when the claimants' family acquired the subject property in 1902. 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 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 \$190,725. 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 Diane Ulventhe claimants to use the subject property for a use permitted at the time Diane Ulven acquired the property on August 12, 1988, and at the time Andrew Ulven acquired it on October 20, 1993.

The claimants acquired the subject property on August 12, 1988, and October 20, 1993. At those times, the property was subject to the Marion County's acknowledged EFU zone.<sup>4</sup> When the claimants acquired the subject property, the desired development of the property would have been governed by the county's acknowledged EFU zone and the applicable provisions of ORS 215 then in effect.<sup>5</sup> On both August 12, 1988, and October 20, 1993, ORS 215.283(1)(f) (1987 and 1991 editions) generally allowed farm dwellings "customarily provided in conjunction with farm use." Non-farm dwellings were allowed under ORS 215.283(3) if they were determined to be compatible with farm use, not interfere seriously with accepted farm practices, not materially alter the stability of the land use pattern in the area and be situated on generally unsuitable land for the production of farm crops and livestock.

No information has been presented in the claim to establish whether the claimants' desired use of the subject property would have been permitted under the county's acknowledged plan and the provisions of ORS 215 in effect when they acquired the property.

---

<sup>4</sup> Marion County's EFU zone was acknowledged by the Commission for compliance with Goal 3 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).

There may be other laws that apply to the claimants' use of the property that have not been identified in the claim. In some cases, it will not be possible to know which laws apply to a use of the subject property until there is a specific proposal for that use. When the claimants seek a building or development permit to carry out a specific use, it may become evident that other state laws apply to that use, and depending on when they were enacted or adopted, may continue to apply to the claimants' property. In addition, some of these laws may be exempt under ORS 197.352(3)(A) to (D) and will continue to apply to the subject property on that basis.

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 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 building or development permit to carry out a specific use, it may become evident that other state laws apply to that use.

### **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 the claimants' development of a dwelling on the 24.91-acre property: applicable provisions of Goal 3, ORS 215 and OAR 660, division 33, enacted or adopted after the claimants acquired the subject property. 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 Diane Ulven acquired the property on August 12, 1988, and when Andrew Ulven acquired it on October 20, 1993.
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 when Diane Ulven acquired the property on August 12, 1988, and when Andrew Ulven acquired it on October 20, 1993. On those dates, the property was subject to compliance with Marion County's acknowledged EFU zone, and the applicable provisions of Goal 3, ORS 215 and OAR 660, division 5, 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 and/or county and/or metropolitan service district that enforces land use regulations applicable to the property. Nothing in this order relieves the claimants from the necessity of obtaining a decision under ORS 197.352 from a local public entity that has jurisdiction to enforce a land use regulation applicable to a use of the subject property by the claimants.

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

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

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. M122260
(BALLOT MEASURE 37) OF	)	
Diane and Andrew Ulven, CLAIMANTS	)	

Claimants: Diane and Andrew Ulven (the Claimants)

Property: Township 7S, Range 1W, Section 5, Tax lot 1900, 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 the claimants' development of a dwelling on the 24.91-acre property: applicable provisions of Goal 3, ORS 215 and OAR 660, division 33, enacted or adopted after the claimants acquired the subject property. 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 Diane Ulven acquired the property on August 12, 1988, and when Andrew Ulven acquired it on October 20, 1993.
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 when Diane Ulven acquired the property on August 12, 1988, and when Andrew Ulven acquired it on October 20, 1993. On those dates, the property was subject to compliance with Marion County's acknowledged EFU zone, and the applicable provisions of Goal 3, ORS 215 and OAR 660, division 5, 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

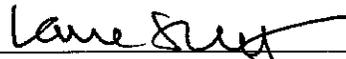
or other form of authorization or consent, the order will not authorize the use of the property unless the claimants first obtain that permit, license or other form of authorization or consent. Such requirements may include, but are not limited to: a building permit, a land use decision, a "permit" as 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 and/or county and/or metropolitan service district that enforces land use regulations applicable to the property. Nothing in this order relieves the claimants from the necessity of obtaining a decision under ORS 197.352 from a local public entity that has jurisdiction to enforce a land use regulation applicable to a use of the subject property by the claimants.

This Order is entered by the Director of the DLCD as a final order of DLCD and the Land Conservation and Development Commission under ORS 197.352, OAR 660-002-0010(8), and OAR 125, division 145, and by the 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 18<sup>th</sup> day of July, 2006.

FOR the DEPARTMENT OF ADMINISTRATIVE  
SERVICES:



David Hartwig, Administrator  
DAS, State Services Division

Dated this 18<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.”

---

<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.