

BEFORE THE DEPARTMENT OF ADMINISTRATIVE SERVICES,  
THE DEPARTMENT OF LAND CONSERVATION AND DEVELOPMENT, AND  
THE WATER RESOURCES DEPARTMENT  
OF THE STATE OF OREGON

IN THE MATTER OF THE CLAIM FOR ) FINAL ORDER  
COMPENSATION UNDER ORS 197.352 ) CLAIM NO. M122338  
(BALLOT MEASURE 37) OF )  
M.P.R. Development Co., an Oregon Corporation, CLAIMANT )

Claimant: M.P.R. Development Co., an Oregon Corporation (the Claimant)

Property: Township 1S, Range 1W, Section 31B, Tax lot 800, Washington 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), and the Oregon Water Resources Department (the WRD Report), attached to and by this reference incorporated into this order.

ORDER

The Claim is denied as to laws administered by the WRD for the reasons set forth in the WRD Report.

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 MPR Development Company's division of the 43.4-acre property into up to 15 parcels or to its development of a dwelling on each parcel: applicable provisions of Goal 3, ORS 215, and OAR 660, division 33. These land use regulations will not apply to the claimant only to the extent necessary to allow it to use the subject property for the use described in this report, and only to the extent that use was permitted when it acquired the property on January 16, 1965.
2. The action by the State of Oregon provides the state's authorization to the claimant to use the property for the use described in this report, subject to the standards in effect on January 16, 1965.
3. To the extent that any law, order, deed, agreement or other legally enforceable public or private requirement provides that the subject property may not be used without a permit, license or other form of authorization or consent, the order will not authorize the use of the property

unless the claimant first obtains that permit, license or other form of authorization or consent. Such requirements may include, but are not limited to: a building permit, a land use decision, a "permit" as defined in ORS 215.402 or 227.160, other permits or authorizations from local, state or federal agencies and restrictions on the use of the subject property imposed by private parties.

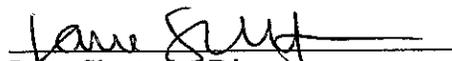
4. Any use of the subject property by the claimant under the terms of the order will remain subject to the following laws: (a) those laws not specified in Condition 1 above; (b) any laws enacted or enforced by a public entity other than the Commission or the department; and (c) those laws not subject 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 property, it may be necessary for it to obtain a decision under ORS 197.352 from a city and/or county and/or metropolitan service district that enforces land use regulations applicable to the property. Nothing in this order relieves the claimant from the necessity of obtaining a decision under ORS 197.352 from a local public entity that has jurisdiction to enforce a land use regulation applicable to a use of the subject property by the claimant.

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

This Order is entered by the Director of the WRD as a final order of WRD under ORS 197.352, and OAR Chapter 125, division 145.

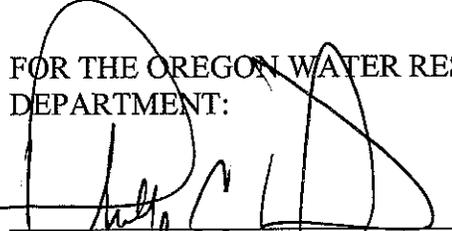
FOR DLCD AND THE LAND  
CONSERVATION AND DEVELOPMENT  
COMMISSION:

  
Lane Shetterly, Director  
DLCD  
Dated this 28<sup>th</sup> day of July, 2006.

FOR THE DEPARTMENT OF  
ADMINISTRATIVE SERVICES:

  
Lindsay A. Ball  
DAS  
Dated this 28<sup>th</sup> day of July, 2006.

FOR THE OREGON WATER RESOURCES  
DEPARTMENT:

  
Phillip C. Ward, Director  
WRD  
Dated this 28<sup>th</sup> day of July, 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)

### 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  
Draft Staff Report and Recommendation**

July 28, 2006

**STATE CLAIM NUMBER:** M122338

**NAME OF CLAIMANT:** MPR Development Co., an Oregon Corp.

**MAILING ADDRESS:** None Provided

**PROPERTY IDENTIFICATION:** Township 1S, Range 1W, Section 31B  
Tax lot 800  
Washington County

**OTHER CONTACT INFORMATION:** Donald Joe Willis  
Schwabe, Williamson & Wyatt  
1211 Southwest 5<sup>th</sup> Avenue  
Suite 1900  
Portland, Oregon 97204

**DATE RECEIVED BY DAS:** September 7, 2005

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

**I. SUMMARY OF CLAIM**

The claimant, MPR Development CO., an Oregon corporation (“MPR” or the “claimant”), seeks compensation in the amount of \$3.5 million for the reduction in fair market value as a result of land use regulations that are alleged to restrict the use of certain private real property. The claimant desires compensation or the right to divide the 43.4-acre property into 15 parcels and to develop a dwelling on each parcel. The subject property is located as described above, in Washington County. (See claim.)

**II. SUMMARY OF STAFF RECOMMENDATION**

Based on the preliminary 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 MPR’s division of the 43.4-acre property into 15 parcels and to its development of a dwelling on each parcel: applicable provisions of Statewide Planning Goal 3

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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).

(Agricultural Lands), ORS 215, and Oregon Administrative Rule (OAR) 660, division 33.<sup>2</sup> These laws will not apply to the claimant only to the extent necessary to allow it to use the subject property for the use described in this report, and only to the extent that use was permitted when it acquired the property in 1965. (See the complete recommendation in Section VI of this report.)

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

#### **Comments Received**

On October 3, 2005, pursuant to OAR 125-145-0080, the Oregon Department of Administrative Services (DAS) provided written notice to the owners of surrounding properties. According to DAS, one written comment was received in response to the 10-day notice.

The comment is relevant to whether the restriction of the claimant's use of the subject property reduces the fair market value of the property and whether a state agency may waive state law. The comment has been considered by the department in preparing this report.

### **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 criterion 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 criterion, whichever is later.

#### **Findings of Fact**

This claim was submitted to DAS on September 7, 2005, for processing under OAR 125, division 145. The claim identifies ORS 215.780, ORS 537, OAR 660-06-0055, and a list of other state statutes as the basis for the claim. Only laws that were enacted or adopted prior to December 2, 2004, are the basis for this claim.

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<sup>2</sup> The claim also lists laws administered by the Oregon Water Resources Department (OWRD), which are addressed in a separate report by OWRD.

## **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 claimant, M.P.R. Development CO., an Oregon corporation, acquired the subject property on January 16, 1965, as reflected by an assignment of an undivided one-half interest in the vendee’s interest in a land sale contract included with the claim. Title documents submitted with the claim establish the claimant’s current ownership. MPR is an active Oregon corporation, first registered in 1963.

## **Conclusions**

The claimant, MPR is an “owner” of the subject property as that term is defined by ORS 197.352(11)(C), as of January 16, 1965.

### **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 claimant desires to divide the property into fifteen parcels and establish a dwelling on each parcel. The claim lists a large number of state statutes and rules as restricting this use of the property, and specifically states that “ORS ORS 215.780, ORS 537, OAR 660-06-0055 restrict the creation of new rural residential parcels and construction of single-family dwellings.” As noted above, the statutes contained in ORS chapter 537 are not administered by DLCD, and are addressed in a separate report on this claim being prepared by the Oregon Water Resources Department.

The claim lists many selected statutes in ORS chapters 92 (Subdivisions and Partitions), 197 (Comprehensive Land Use Planning Coordination), 199 (Local Government Boundary Commissions), 215 (County Planning; Zoning; Housing Codes), 268 (Metropolitan Service

Districts), along with ORS 209.250(4), OAR 125-145 (the state's Measure 37 procedural rules), and certain rules in OAR chapter 660 (LCDC rules) as restricting the claimant's desired use of the property.

The statutes listed in ORS chapter 92 establish procedures for partitioning and subdividing property. To the extent that the listed statutes restrict the claimant's desired use of the property, the operative provisions of the statutes were in effect at the time MPR acquired an interest in the property in 1965. The claimant has not established that the listed statutes restrict the claimant's desired use of the property, or that they have the effect of reducing the fair market value of the property..

The statutes listed in ORS chapter 197 generally authorize the creation of the statewide land use planning system. The claimant has not established that the listed statutes restrict the claimant's desired use of the property. The claimant's attorney specifically mentions statutes that "restrict the ability of Washington County and Metro to freely decide when to bring the subject property into the UGB and allow urban development." But the claimant's desired use – to divide the 43-acre property into up to fifteen parcels and develop a house on each parcel – is not clearly restricted by Goal 14 or land use regulations relating to urban growth boundaries. The claimant has not shown that these laws necessarily apply to the claimant's desired use. The claimant's attorney also identifies statutes that authorize the Commission to enact new regulations as land use regulations that must be waived. ORS 197.352 did not eliminate the authority of the Commission or the department to enact new land use regulations. Rather, it simply gave property owners the right to seek relief if the Commission or department enact such regulations that restrict the owner's use and have the effect of reducing the property's fair market value.

The statutes listed in ORS chapter 199 authorize the creation of boundary commissions. There is no boundary commission with jurisdiction over the subject property, and MPR has not established that these statutes restrict the claimant's desired use of the property.

ORS 209.250(4) establishes requirements for surveyORS who reestablish or establish a boundary monument. The claimant has not established how this statute restricts the desired use of the property.

The statutes listed in ORS chapter 268 authorize the establishment and operation of Metropolitan Service Districts. The property is not within the boundary of a Metropolitan Service District, and the claimant has not established how these statutes restrict the desired use of the property.

The administrative rules contained in OAR 125-145 are not state land use regulations and do not restrict the claimant's desired use of the property. The claim expressly states that the claimant is not following these rules, and as a result the claimant cannot establish that they restrict the desired use.

The claim also specifically identifies OAR 660-06-0055 (sic). OAR 660-006-0055 establishes requirements for new land divisions in farm/forest zones. The property is zoned AF-20, which is an EFU zone and not a mixed farm-forest zone. As a result, this rule does not apply to the claimant's desired use of the property. The claimant's attorney also specifically identifies OAR 660-004. These rules apply to exception lands. The property is not subject to the rule because it is located within an EFU zone, not on exception lands.

The claimant's attorney also specifically identifies OAR 660-007 and 660-008. OAR 660-007 only applies to land within the Portland metropolitan area urban growth boundary. The property is not within the Portland metro UGB. The claimant has not established that 660-008 applies to the claimant's desired use of the property.

The claimant's attorney also specifically identifies OAR 660-011. The claimant's desired use did not indicate that the claimant seeks to establish any particular type of service for the desired use. As a result, the department is unable to determine that Goal 11 applies to the desired use of the property.

The claim is based generally on Washington County's current AF-20 zone (an Exclusive Farm Use (EFU) zone) and the applicable provisions of state law that require such zoning. The claimants' property is zoned AF-20 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 3 to be zoned EFU pursuant to ORS 215.

Current land use regulations, particularly ORS 215.213, 215.263 and 215.780 and OAR 660, division 33, enacted or adopted pursuant to Goal 3, prohibit the division of EFU-zoned land into parcels less than 80 acres and establish standards for development of dwellings on existing or proposed parcels on EFU-zoned land.

ORS 215.780 establishes an 80-acre minimum size for the creation of new lots or parcels in EFU zones and became effective on November 4, 1993 (Chapter 792, Oregon Laws 1993). ORS 215.263 (2005 edition) establishes standards for the creation of new parcels for non-farm uses and dwellings allowed in an EFU zone.

OAR 660-033-0135 (applicable to farm dwellings) became effective on March 1, 1994, and interprets the statutory standard for a primary dwelling in an EFU zone under ORS 215.213. OAR 660-033-0130(4)(e) (applicable to non-farm dwellings in marginal land counties) became effective on August 7, 1993, and was amended to comply with ORS 215.284(4) on March 1, 1994. The Commission subsequently adopted amendments to comply with House Bill 3326 (Chapter 704, Oregon Laws 2001, effective on January 1, 2002), which were effective on May 22, 2002. (See administrative rule history for OAR 660-033-0100, -0130 and -0135.)

The claimants acquired the subject property on January 16, 1965, prior to the adoption of the statewide planning goals and their implementing statutes and regulations.

### **Conclusions**

The current zoning requirements, minimum lot size and dwelling standards established by applicable provisions of Goal 3, ORS 215, and OAR 660, division 33, were all enacted or adopted after the claimants acquired the subject property in 1965 and do not allow the desired

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

division or residential development of the property. These laws restrict the use of the subject property relative to the uses allowed when the claimants acquired the property.

This report addresses only those state laws that are identified in the claim that the department has determined apply to the claimant's desired use of the property. There may be other laws that apply to the claimant's desired use of the subject property based on further details concerning that use that have not been provided to the department. 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 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 \$3.5 million as the reduction in the subject property's fair market value due to the regulation(s). This amount is based on the inability of the claimant to develop 15 parcels for residential development.

#### **Conclusions**

As explained in Section V.1 of this report, the claimant is MPR Development Company, who acquired an interest in the subject property on January 16, 1965. Under ORS 197.352, the claimant is 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 claimant acquired the subject property restrict the claimant's desired use of the property. The claimant estimates that the effect of the regulation(s) on the fair market value of the property is a reduction of \$3.5 million.

Without an appraisal or other documentation and without verification of whether or the extent to which the claimant's desired use of the subject property was allowed under the standards in effect when the claimant 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 it is more likely than not that the fair market value of the subject property has been reduced to some extent as a result of land use regulations enforced by the Commission or the department.

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

ORS 197.352 does not apply to certain land use regulations. In addition, under ORS 197.352(3), certain types of laws are exempt 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, division 33, which Washington County has implemented through its AF-20 zone. Many of the specific statutes listed in ORS chapter 92 were in effect in 1965. The other state land use regulations that the department has determined restrict the claimant's desired use were enacted or adopted after the claimant 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. With the exception of the statutes in ORS chapter 92, it appears that none of the general statutory, goal and rule restrictions on division and development of the subject property were in effect when the claimant acquired the property in 1965. As a result, these laws are not exempt under ORS 197.352(3)(E).

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 claimant's use of the subject property that have not been identified in the claim. In some cases, it will not be possible to know which laws apply to a use of the subject property until there is a specific proposal for that use. When the claimant seeks a building or development permit to carry out a specific use, it may become evident that other state laws apply to that use. In some cases, some of these laws may be exempt under ORS 197.352(3)(A) to (D).

This report addresses only those state laws that are identified in the claim, or that the department is certain apply to the subject property based on the use that the claimant has identified. Similarly, this report only addresses the exemptions provided for 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 it 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 its 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 the 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 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 \$3.5 million. 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 claimant's 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 likely 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 MPR Development Company to use the subject property for a use permitted at the time it acquired the property on January 16, 1965.

## **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 MPR Development Company's division of the 43.4-acre property into up to 15 parcels or to its development of a dwelling on each parcel: applicable provisions of Goal 3, ORS 215, and OAR 660, division 33. These land use regulations will not apply to the claimant only to the extent necessary to allow it to use the subject property for the use described in this report, and only to the extent that use was permitted when it acquired the property on January 16, 1965.
2. The action by the State of Oregon provides the state's authorization to the claimant to use the property for the use described in this report, subject to the standards in effect on January 16, 1965.
3. To the extent that any law, order, deed, agreement or other legally enforceable public or private requirement provides that the subject property may not be used without a permit, license or other form of authorization or consent, the order will not authorize the use of the property unless the claimant first obtains that permit, license or other form of authorization or consent. Such requirements may include, but are not limited to: a building permit, a land use decision, a "permit" as defined in ORS 215.402 or 227.160, other permits or authorizations from local, state or federal agencies and restrictions on the use of the subject property imposed by private parties.
4. Any use of the subject property by the claimant under the terms of the order will remain subject to the following laws: (a) those laws not specified in 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 property, it may be necessary for it to obtain a decision under ORS 197.352 from a city and/or county and/or metropolitan service district that enforces land use regulations applicable to the property. Nothing in this order relieves the claimant from the necessity of obtaining a decision under ORS 197.352 from a local public entity that has jurisdiction to enforce a land use regulation applicable to a use of the subject property by the claimant.

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

The department issued its draft staff report on this claim on June 29, 2006. Under OAR 125-145-0100(3), the department provided an opportunity for comments on the draft report to the claimant and any third party who had earlier submitted comments on the claim. The attorney for the claimant submitted comments on the draft report that WRD has considered in this final report.

**ORS 197.352 (2004 OREGON BALLOT MEASURE 37)  
CLAIM FOR COMPENSATION**

**OREGON WATER RESOURCES DEPARTMENT**

**Staff Report and Recommendation**

July 27, 2006

**STATE CLAIM NUMBER:** M122338

**NAME OF CLAIMANT:** M.P.R. Development CO., an Oregon corporation

**PROPERTY IDENTIFICATION:** T1S, R1W, section 31B WM,  
tax lot 800  
Washington County

**OTHER CONTACT INFORMATION:** Donald Joe Willis  
Schwabe, Williamson & Wyatt  
1211 SW 5<sup>th</sup> Ave., Suite 1900  
Portland, Oregon 97204

**DATE RECEIVED BY DAS:** September 14, 2005

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

**I. CLAIM**

The claimant, M.P.R. Development CO., an Oregon corporation ("MPR or the "claimant") seeks compensation in the amount of \$3,500,000 for the reduction in fair market value of the Property as a result of OAR 690-502-0160 and ORS 537.730, 537.735, 537.740 and 537.742 that are alleged to prohibit division of the Property into 15 parcels and development of a dwelling on each parcel. The Property is located in Washington County and is described as T1S, R1W, section 31B WM, tax lot 800. (See claim.)

**II. SUMMARY OF STAFF RECOMMENDATION**

Based on the preliminary findings and conclusions set forth below, the Oregon Water Resources Department (WRD) has determined that the claimant is not entitled to relief under ORS 197.352. Based on advice of counsel and department staff recommendations, WRD has not restricted any property right that claimant has with regard to the Property. Based on this determination, the

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<sup>1</sup> In *MacPherson v. Dep't of Admin. Servs.*, \_\_\_ Or \_\_\_, 2006 Ore. LEXIS 104 (February 21, 2006), the Marion County trial court entered an order suspending all timelines under ORS 197.352. This order was in effect for a period of 139 days, extending the 180-day deadline under ORS 197.352(6) by that same period.

department has not completed a full evaluation or determination on the merits or substance of the remainder of the elements necessary for it to approve a claim.

### **III. COMMENTS RECEIVED**

Pursuant to OAR 125-145-0080, the Oregon Department of Administrative Services (DAS) provided written notice to the owners of surrounding properties as determined by DAS. According to DAS, no comments were received from the notice mailed.

### **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 ORS 197.352 (December 2, 2004), within two years of that effective date or the date the public entity applies for 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 the ORS 197.352 (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 14, 2005, for processing under OAR Chapter 125. The claim identifies ORS 537.730, 537.735, 537.740 and 537.742, and OAR 690-502-0160 as land use regulations that restrict the claimant's desired use of the property as the basis for the claim. The statutes and rule listed in the claim were adopted prior to December 2, 2004, the effective date of ORS 197.353.

#### **Conclusions**

The claim was submitted within two years of December 2, 2004, based on state laws in effect 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 to "owners" as that term is defined in ORS 197.352(11)(C). Under that section, an "owner" is "the present owner of the property, or any interest therein."

## **Findings of Fact**

WRD incorporates by reference the findings of fact in the Staff Report of the Department of Land Conservation and Development (DLCD) regarding ownership.

## **Conclusions**

WRD incorporates by reference the conclusions in the Staff Report of DLCD regarding ownership. The claimant, M.P.R. Development Co., is an "owner" of an interest in tax lot 800 (T1S, R1W, section 31B) as that term is defined by ORS 197.352(11)(C), as of January 16, 1965.

## **2. The Laws That Are the Basis for the 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 identifies ORS 537.730, 537.735, 537.740 and 537.742, as well as ORS 690-502-0160 as land use regulations that restrict the claimant's use of the Property. These state laws concern the use of groundwater in areas designated as a critical groundwater area. The Property is located within a critical groundwater area, which was established on September 17, 1974.

The claimant has identified a letter from Watermaster Darrell Hedin, which confirms that certain types of new groundwater wells appropriating water from the basalt aquifer of the Cooper Mountain-Bull Mountain Critical Groundwater Area may only be developed for single family domestic use on tracts of land ten acres or larger.

The Oregon Water Code was enacted in 1909. Under this authority (ORS 536), the Water Resources Commission is obligated to adopt rules and standards to allow the orderly development of waters of the State and to protect senior water right holders. The Commission is further instructed to progressively formulate an integrated, coordinated program for the use and control of all the water resources of this state. Groundwater is specifically managed under the 1955 Ground Water Act (ORS 537.505). Waters of the State of Oregon are owned by the state, and there is no property right to the use of groundwater except by permit or other vested authorization. At the time the claimant acquired the Property, it had no permit or other vested right to the use of groundwater. In 1974, when the State Engineer adopted the Cooper Mountain-Bull Mountain Critical Groundwater Area, the claimant had no permit or other vested right to the use of groundwater. As a result, the issuance of the order designating the critical groundwater area did not and does not restrict any private property interest held by claimant.<sup>2</sup>

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<sup>2</sup> The State Engineer's order applies to the use of water from the basalt aquifer of the critical groundwater area. A further reason for denial of this claim is that the use the claimant has described does not identify the use of water from this aquifer as the claimant's desired use.

The claim also identifies OAR 690-502-160. This administrative rule provides that

(1) Use of groundwater from the basalt aquifer within the Cooper-Bull Mountain Critical Groundwater Area shall be as described in the State Engineer's order designating the Cooper-Bull Mountain Critical Groundwater Area dated May 17, 1974.

The rule does not restrict any private property right that the claimant has, nor does it have any effect independent of the State Engineer's order referenced in the rule.

Finally, the critical groundwater area statutes specifically listed in the claim were enacted in 1955. And, under ORS 197.352(11), "land use regulations" do not include the orders or rules of the Oregon Water Resources Commission or the State Engineer. As a result, the identified statutes, rule and order are not "land use regulations" under ORS 197.352.

For the foregoing reasons, WRD is not authorized to provide relief for this claim.

### **Conclusions**

At least one water right exists on the Property. The Department has not denied an application filed by the claimant for an additional water right for use of water on the Property. The statutes predate the claimant's date of acquisition and the rule is not a land use regulation. WRD has not taken any action since December 2, 2004, to enforce an existing state law that restricts the claimant's right to use tax lot 800 for any purpose. Further, the laws identified in the claim are not "land use regulations" under ORS 197.352(11). For all of these reasons, there is no basis upon which WRD may approve this claim under ORS 197.352.

### **3. Effect of Regulations on Fair Market Value**

In order to establish a valid claim, ORS 197.352(1) requires that any laws 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 \$3,500,000 as the reduction in the subject property's fair market value due to current regulations.

### **Conclusions**

The claim provides no evidence that identified statutes or order of the Water Resources Department have had the effect of reducing the fair market value of the property. The claimant had no vested right to use groundwater at the time it acquired the Property, and had no vested right to use groundwater at the time the critical groundwater area order was adopted. As a result there is no evidence in the record for this claim that the fair market value of the property has been reduced by a land use regulation that WRD has enforced.

#### **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. WRD has not analyzed whether any of the exemptions may apply to this claim, because it has determined that there is no restriction on use, and no reduction in value. WRD notes, however, that the critical groundwater area statutes were enacted to protect existing, vested rights to the use of groundwater.

#### **VI. FORM OF RELIEF**

ORS 197.352(1) requires payment of compensation to an owner of private real property if the department has enacted or enforced a land use regulation that restricts the claimant's rights to use of the property in a manner that reduces its fair market value. Because the claimant had no right to use groundwater, and because the laws in question either predate the claimant's date of acquisition or are not land use regulations, and because the claimant has not provided any evidence that these laws have reduced the fair market value of the Property, WRD concludes that it is not authorized by ORS 197.352 to provide relief to the claimant.

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

The department issued its draft staff report on this claim on June 29, 2006. Under OAR 125-145-0100(3), the department provided an opportunity for comments on the draft report to the claimant and any third party who had earlier submitted comments on the claim. The attorney for the claimant submitted comments on the draft report that WRD has considered in this final report.