

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

IN THE MATTER OF THE CLAIM FOR ) FINAL ORDER  
COMPENSATION UNDER ORS 197.352 ) CLAIM NO. M 122835  
(BALLOT MEASURE 37) OF )  
Freeman Properties West, LLC, )  
Cynthia Van Lom, and )  
Mark Silversten, CLAIMANTS )

Claimants: Freeman Properties West, LLC, Cynthia Van Lom, and Mark Silversten  
(the Claimants)

Property: Township 41S, Range 13W, Section 23C, Tax lot 105  
Township 41S, Range 13W, Section 22D, Tax lot 500  
Curry County (the property)

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

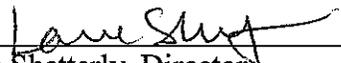
Claimants submitted the Claim to the State of Oregon under ORS 197.352. Under  
OAR 125-145-0010 *et seq.*, the Department of Administrative Services (DAS) referred  
the Claim to the Department of Land Conservation and Development (DLCD) as the  
regulating entity. This order is based on the record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

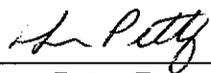
This Order is entered by the Director of the DLCD as a final order of DLCD and the  
Land Conservation and Development Commission under ORS 197.352, OAR 660-002-  
0010(8), and OAR chapter 125, division 145, and by the Deputy Administrator for the  
State Services Division of the DAS as a final order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

FOR DLCD AND THE LAND  
CONSERVATION AND DEVELOPMENT  
COMMISSION:

  
Lane Shetterly, Director  
DLCD

Dated this 29<sup>th</sup> day of August, 2006.

FOR the DEPARTMENT OF  
ADMINISTRATIVE SERVICES:

  
Dugan Petty, Deputy Administrator  
DAS, State Services Division

Dated this 29<sup>th</sup> day of August, 2006.

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

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

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

(Copies of the documents that comprise the record are available for review at the Department's office at 635 Capitol Street NE, Suite 150, Salem, Oregon 97301-2540)

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<sup>1</sup> By order of the Marion County Circuit Court, "all time lines under Measure 37 [were] suspended indefinitely" on October 25, 2005. This suspension was lifted on March 13, 2006 by the court. As a result, a period of 139 days (the number of days the time lines were suspended) has been added to the 180-day time period under ORS 197.352(6) for claims that were pending with the state on October 25, 2005.

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

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

August 29, 2006

**STATE CLAIM NUMBER:** M122835

**NAMES OF CLAIMANTS:** Freeman Properties West, LLC  
Cynthia Van Lom  
Mark Silversten

**MAILING ADDRESS:** PO Box 25744  
Portland, Oregon 97298

**PROPERTY IDENTIFICATION:** Township 41S, Range 13W, Section 23C  
Tax lot 105  
Township 41S, Range 13W, Section 22D  
Tax lot 500  
Curry County

**OTHER INTEREST IN PROPERTY:** Winharbor Farms, LLC (lessee)

**DATE RECEIVED BY DAS:** October 17, 2005

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

**I. SUMMARY OF CLAIM**

The claimants, Freeman Properties West, LLC, Cynthia Van Lom and Mark Silversten, seek compensation in the amount of \$2,440,000 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 61.39-acre subject property and to establish commercial and residential development on each parcel. The subject property is located at the locational coordinates listed above, near Brookings, in Curry 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 not valid because Freeman Properties West's desired use of the subject property was prohibited under the laws in effect when it acquired the property in 2003 and because claimants Cynthia Van Lom and

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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).

Mark Silversten are not current owners of the subject property. (See the complete recommendation in Section VI. of this report.)

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

#### **Comments Received**

On June 27, 2006, pursuant to Oregon Administrative Rules (OAR) 125-145-0080, the Oregon Department of Administrative Services (DAS) provided written notice to the owners of surrounding properties. According to DAS, three written comments were received in response to the 10-day notice.

The comments do not address whether the claim meets the criteria for relief under ORS 197.352. Comments concerning the effects a use of the subject property may have on surrounding areas are generally not something that the department is able to consider in determining whether to waive a state law. If funds do become available to pay compensation, then such effects may become relevant in determining which claims to pay compensation for instead of waive a state law. (See the comment letters in the department's claim file.)

### **IV. TIMELINESS OF CLAIM**

#### **Requirement**

ORS 197.352(5) requires that a written demand for compensation be made:

1. For claims arising from land use regulations enacted prior to the effective date of Measure 37 (December 2, 2004), within two years of that effective date, or the date the public entity applies the land use regulation as an approval criteria to an application submitted by the owner, whichever is later; or
2. For claims arising from land use regulations enacted after the effective date of Measure 37 (December 2, 2004), within two years of the enactment of the land use regulation, or the date the owner of the property submits a land use application in which the land use regulation is an approval criteria, whichever is later.

#### **Findings of Fact**

This claim was submitted to DAS on October 17, 2005, for processing under OAR 125, division 145. The claim identifies Senate Bills 10 (1969), 100 and 101 (1973), Goal 4, ORS 92 and 527.630 and OAR 660, division 6, 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 Freeman Properties West, LLC<sup>2</sup> acquired the subject property on August 12, 2003, as reflected by the title report included with the claim. Claimants Cynthia Van Lom and Mark Silversten are members and unit owners of Freeman Properties West; however, neither has an individual ownership interest in the subject property.<sup>3</sup> The Curry County Assessor’s Office confirms Freeman Properties West’s current ownership of the subject property.

### **Conclusions**

Claimant Freeman Properties West, LLC is an “owner” of the subject property as that term is defined by ORS 197.352(11)(C), as of August 12, 2003. Claimants Cynthia Van Lom and Mark Silversten are not “owners” of the subject property as that term is defined in ORS 197.352(11)(C).<sup>4</sup>

### **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 acquired the property.

### **Findings of Fact**

The claim indicates that the claimants desire divide the 61.39 acre subject property and to establish commercial and residential development on each parcel. It indicates that county zoning regulations prevent the desired use.

The claim is based on the applicable provisions of state law that require Exclusive Farm Use (EFU) zoning and restrict uses on EFU-zoned land. The subject property is zoned Forest Grazing (AFD) by Curry County as required by Statewide Planning Goal 3 (Agricultural Lands) in accordance with ORS 215 and OAR 660, division 33, because the property is “agricultural

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<sup>2</sup> Freeman Properties West, LLC is an active domestic limited liability company registered with the Oregon Secretary of State.

<sup>3</sup> Freeman Properties West acquired the subject property from Cynthia Van Lom and Mark Silversten’s parents.

<sup>4</sup> An “owner” that is a corporate entity cannot claim an individual as a “family member,” as that term is defined in ORS 197.352(11)(A). Therefore, neither of the individuals who transferred the subject property to Freeman Properties West is a “family member” of Freeman Properties West.

land” as defined by Goal 3.<sup>5</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 215.263, 215.284 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 that 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 215.283(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 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.)

Claimant Freeman Properties West acquired the subject property on August 12, 2003. At that time, the property was subject to the current laws in effect, as described above.

### **Conclusions**

The current zoning requirements, minimum lot size and dwelling standards established by Goal 3 and provisions applicable to land zoned agricultural in ORS 215 and OAR 660, division 33, were all enacted or adopted before Freeman Properties West acquired the subject property on August 12, 2003. These land use regulations do not allow the division of the property into parcels with commercial and residential development on each parcel. Laws enacted or adopted since Freeman Properties West acquired the subject property in 2003 do not restrict the claimants’ desired use of the property relative to when it acquired the property in 2003.

### **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.”

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<sup>5</sup> The subject property is “agricultural land” because it contains Natural Resources Conservation Service Class I-IV soils.

## **Findings of Fact**

The claim includes an estimate of \$2,440,000 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 is based on the claimants' assessment of the subject property's value.

## **Conclusions**

As explained in Section V.(1) of this report, claimant Freeman Properties West acquired the subject property on August 12, 2003. No state laws enacted or adopted since Freeman Properties West acquired the subject property restrict the use of the property relative to the uses allowed in 2003. Therefore, the fair market value of the subject property has not been reduced as a result of land use regulations enforced by the Land Use Conservation and Development Commission (the Commission) or the department.

As further explained in Section V.(1) of this report, claimants Cynthia Van Lom and Mark Silversten are not owners of the subject property. Therefore, no laws enforced by the Commission or the department restrict their use of private real property with the effect of reducing the fair market value of the property.

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

ORS 197.352 does not apply to certain land use regulations. In addition, under ORS 197.352(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 Goal 3, ORS 215 and OR 660, division 33, which Curry County has implemented through its current AFD zone. All of these land use regulations were in effect when claimant Freeman Properties West acquired the property in 2003.

## **Conclusions**

All of the state land use regulations that restrict Freeman Properties West's desired use of the subject property were in effect when it acquired the property. Therefore, all of these state land use regulations are exempt under ORS 197.352(3)(E), which exempts laws in effect when Freeman Properties West acquired the subject property.

Claimants Cynthia Van Lom and Mark Silversten are not owners of the subject property. Therefore, the issue of whether any laws are exempt from ORS 197.352 is not relevant as to these claimants.

## **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, the department finds that laws enforced by the Commission or the department do not restrict Freeman Properties West's desired use of the subject property relative to what was permitted when it acquired the property in 2003 and do not reduce the fair market value of the property. All state laws restricting the use of the subject property are exempt under ORS 197.352(3)(E) as to Freeman Properties West.

The department further finds that the claim for Cynthia Van Lom and Mark Silversten is not valid because these claimants are not owners of the subject property.

### **Conclusions**

Based on the record and the foregoing findings and conclusions, Freeman Properties West is not entitled to relief under ORS 197.352(1) as a result of land use regulations enforced by the Commission or the department because its desired use of the subject property was prohibited under the laws in effect when it acquired the property in 2003, and claimants Cynthia Van Lom and Mark Silversten are not entitled to relief under ORS 197.352(1) because they are not owners of the property. Therefore, the department recommends that this claim be denied.

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

The department issued its draft staff report on this claim on August 10, 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.