

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 | ) | AMENDED FINAL ORDER |
| COMPENSATION UNDER ORS 197.352 | ) | CLAIM NO. M124481   |
| (BALLOT MEASURE 37) OF         | ) |                     |
| Earl K. Allison, CLAIMANT      | ) |                     |

Claimant: Earl K. Allison (the Claimant)

Property: Township 41S, Range 14E, Section 11 Tax lot 2100, Klamath 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 amended order is based on the record herein, including the Findings and Conclusions set forth in the Amended 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 Earl K. Allison's development of a dwelling on the 49.35-acre parcel: applicable provisions of Goal 4 and Goal 5, ORS 215 and OAR 660, divisions 6, 16, and 23, enacted or adopted after July 6, 1989. These land use regulations will not apply to the claimant only to the extent necessary to allow him to use the subject property for the use described in this report, and only to the extent that use was permitted when he acquired the property on July 6, 1989.
2. The action by the State of Oregon provides the state's authorization to the claimant to use the subject property for the use described in this report, subject to the standards in effect on July 6, 1989. On that date, the property was subject to compliance with Klamath County's acknowledged forest zone and significant resource overlay zone to protect big game (deer and antelope) winter range, the applicable provisions of Goals 4 and 5, ORS 215 and OAR 660, divisions 6 and 16, 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 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 (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 him to obtain a decision under ORS 197.352 from a city and/or county and/or metropolitan service district that enforces land use regulations applicable to the property. Nothing in this order relieves 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.

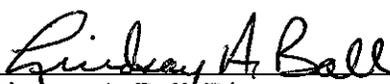
This Order is entered by the Deputy Director of the DLCD as a final order of DLCD and the Land Conservation and Development Commission under ORS 197.352, OAR 660-002-0010(8), and OAR chapter 125, division 145, and by the Director of the DAS as a final order of DAS under ORS 197.352, OAR chapter 125,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

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 Director 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 28<sup>th</sup> day of September, 2006.

FOR the DEPARTMENT OF  
ADMINISTRATIVE SERVICES:

  
Lindsay A. Ball, Director  
DAS  
Dated this 28<sup>th</sup> day of September, 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, 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)

**ORS 197.352 (BALLOT MEASURE 37) CLAIM FOR COMPENSATION**  
**OREGON DEPARTMENT OF LAND CONSERVATION AND DEVELOPMENT**  
**Amended Final Staff Report and Recommendation<sup>1</sup>**

September 28, 2006

**STATE CLAIM NUMBER:** M124481

**NAME OF CLAIMANT:** Earl K. Allison

**MAILING ADDRESS:** 2007 Carlson Drive  
Klamath Falls, Oregon 97603

**PROPERTY IDENTIFICATION:** Township 41S, Range 14E, Section 11  
Tax lot 2100  
Klamath County

**DATE RECEIVED BY DAS:** March 13, 2006

**180-DAY DEADLINE:** September 9, 2006

**I. SUMMARY OF CLAIM**

The claimant, Earl Allison, seeks compensation in the amount of \$50,000 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 claimant desires compensation or the right to develop a dwelling on the 49.35-acre subject property. The subject property is located at the geographic coordinates identified above, on Willow Valley Road, near Bonanza, in Klamath 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 claimant Earl K. Allison's development of a dwelling on the 49.35-acre: applicable provisions of Statewide Planning Goal 4 (Forest Lands) and Goal 5 (Natural Resources), ORS 215 and Oregon Administrative Rules (OAR) 660, divisions 6, 16, and 23, enacted or adopted after July 6, 1989. These laws will not apply to the claimant only to the extent necessary to allow him to use the subject property for the use described in this report, and only to the extent

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<sup>1</sup> This final report amends the final staff report and recommendation issued on September 5, 2006, based on updated information received from Klamath County that was not available when the original final report and order were issued.

that use was permitted when he acquired the property in 1989. (See the complete recommendation in Section VI of this report.)

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

#### **Comments Received**

On August 2, 2006, 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 March 13, 2006, for processing under OAR 125, division 145. The claim identifies county zoning ordinances restricting the claimant's use of the subject property 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 claimant, Earl Allison, acquired the subject property on July 6, 1989, as reflected by a deed included with the claim. A February 3, 2006, title report submitted with the claim establishes the claimant's current ownership of the subject property.

## **Conclusions**

The claimant, Earl Allison, is an "owner" of the subject property as that term is defined by ORS 197.352(11)(C), as of July 6, 1989.

## **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 claim indicates that the claimant desires to build a "farm dwelling" on the subject property and that county zoning restricts his desired use.<sup>2</sup>

The claim is based generally on the applicable provisions of state law that require forest zoning. The claimant's property is zoned Forestry/Range (FR) with a Significant Resource Overlay (SRO) by Klamath County. The subject property is zoned FR, as required by Statewide Planning Goal 4 (Forest Lands), in accordance with ORS 215 and OAR 660, division 6, because the claimant's property is "forest land" under Goal 4. 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)). The forest land administrative rules (OAR 660, division 6) became effective on September 1, 1982, and ORS 215.705 to 215.755 became effective on November 4, 1993 (Chapter 792, Oregon Laws 1993). 660-006-0027 was amended on March 1, 1994, to implement those statutes.

The subject property has also been designated as a significant Goal 5 (Natural Resources) resource—big game winter range—by Klamath County and protected with an SRO.<sup>3</sup> The

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<sup>2</sup> A copy of the claimant's Measure 37 claim form filed with Klamath County indicates that the Forestry Zone Template Dwelling Test/Article 55 of the county code is the regulation that restricts use of the subject property.

<sup>3</sup> According to Article 57.070(1)(a) of the county code, the minimum lot size in the high-density deer winter range overlay is 160 acres and subject to special residential development standards in Article 57.070(2). According to Klamath County (historical zoning information obtained by department staff), the subject property was zoned forest in 1989 and covered by a Significant Resource (SRO) antelope and deer overlay zone adopted in 1984 to protect designated big game (deer and antelope) winter range. The 1984 map, plan, and zoning code does not show the property as high or low density habitat, so according to additional information received from the county on September 15, 2006, the minimum lot size in 1989 would have been 40 acres and a single family residence allowed subject to a county conditional use permit approval. According to county records, the subject property was first designated in the plan as critical deer winter range as early as 1972.

original Goal 5 administrative rule (OAR 660, division 16) became effective on May 5, 1981. OAR 660, division 23, provides the current rules regarding Goal 5 and became effective on September 1, 1996. The division 23 rules do not affect the county's acknowledged Goal 5 inventory with regard to the big game winter range overlay.

The claimant acquired the subject property on July 6, 1989. At that time, the property was subject to the Klamath County's acknowledged FR and SRO zones.<sup>4</sup> When the claimant acquired the subject property in 1989, the claimant's desired development of the property would have been governed by the applicable provisions of OAR 660, divisions 6, and 16, as implemented through the county's FR and SRO zones.<sup>5</sup>

### **Conclusions**

The current minimum lot size of 160 acres established by the SRO, in accordance with Goal 5, and the current zoning requirements and dwelling standards established by Goal 4, ORS 215.705 to 215.755, OAR 660-006-0026 and 660-006-0027, and OAR 660, division 23, were all enacted or adopted after the claimant acquired the subject property in 1989. These land use regulations do not allow the claimant's desired development of the subject property. However, the claim does not establish whether or to what extent the claimant's desired use of the subject property complies with the standards for development in Klamath County's acknowledged forest zone, significant resource overlay zone for Big Game (Deer and Antelope) Winter Range protection, and Comprehensive Plan in effect when the claimant acquired the property on July 6, 1989.

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. There may be other laws that currently apply to the claimant's use of the subject property, and that may continue to apply to the claimant's 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 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.

### **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 \$50,000 as the reduction in the subject property's fair market value due to the regulations that restrict the claimant's desired use of the property. This amount is based on the estimated value of a dwelling on the subject property.

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<sup>4</sup> Klamath County's FR and SRO zones were acknowledged by the Commission for compliance with Goals 4 and 5 on June 1, 1984.

<sup>5</sup> According to updated information received from Klamath County, a single family dwelling would have been allowed subject to approval of a county conditional use permit on a parcel with a minimum area of 40 acres.

## **Conclusions**

As explained in Section V.(1) of this report, the claimant is Earl K. Allison who acquired the subject property on July 6, 1989. 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 land use regulations on the fair market value of the property is a reduction of \$50,000.

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 he 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 Goal 4, Goal 5, ORS 215 and OAR 660, division 6, and OAR 660-023-0110, that Klamath County has implemented through its current Forestry/Range (FR) zone and Goal 5 Significant Resource Overlay zone for protection of High Density Deer Critical Winter Range. With the exception of provisions of Goal 4 and OAR 660, division 6, and Goal 5 and the OAR 660, division 16, Goal 5 rule in effect on July 6, 1989, these state land use regulations were enacted or adopted after the claimant acquired the 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 residential division and development of the subject property are not exempt under ORS 197.352(3)(E) only to the extent they were enacted or adopted after the claimant acquired the property. Provisions of Goals 4 and 5 and OAR 660, divisions 6 and 16 in effect when the claimant acquired the subject property in 1989 are exempt under ORS 197.352(3)(E) and will continue to apply to the property.

Other laws in effect when the claimant acquired the subject property are exempt under ORS 197.352(3)(E) and will also continue to apply to the claimant's use of the property. In addition, the department notes that ORS 215.730 and OAR 660, division 6, include standards for

siting dwellings in forest zones. These provisions include fire protection standards for dwellings and for surrounding forest lands. ORS 197.352(3)(B) specifically exempts regulations “restricting or prohibiting activities for the protection of public health and safety, such as fire and building codes. . . .” Accordingly, siting standards for dwellings in forest zones in ORS 215.730 and OAR 660, division 6, are exempt under ORS 197.352(3)(B).

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 currently apply to that use and may continue to 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 he 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 his 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 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 \$50,000. 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 claimant’s desired use of the property was allowed under the standards in effect when he 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 Earl K. Allison to use the subject property for a use permitted at the time he acquired the property on July 6, 1989.

### 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 Earl K. Allison's development of a dwelling on the 49.35-acre parcel: applicable provisions of Goal 4 and Goal 5, ORS 215 and OAR 660, divisions 6, 16, and 23, enacted or adopted after July 6, 1989. These land use regulations will not apply to the claimant only to the extent necessary to allow him to use the subject property for the use described in this report, and only to the extent that use was permitted when he acquired the property on July 6, 1989.
2. The action by the State of Oregon provides the state's authorization to the claimant to use the subject property for the use described in this report, subject to the standards in effect on July 6, 1989. On that date, the property was subject to compliance with Klamath County's acknowledged forest zone and significant resource overlay zone to protect big game (deer and antelope) winter range, the applicable provisions of Goals 4 and 5, ORS 215 and OAR 660, divisions 6 and 16, 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 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 (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 him to obtain a decision under ORS 197.352 from a city and/or county and/or metropolitan service district that enforces land use regulations applicable to the property. Nothing in this order relieves 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 August 17, 2006. OAR 125-145-0100(3), provided an opportunity for the claimant or the claimant's 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 amended final report.