

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. M124877, M124878
(BALLOT MEASURE 37) OF	)	and M124879
James G. and Patricia M. Clark, CLAIMANTS	)	

Claimants: James G. and Patricia M. Clark (the Claimants)

Property: Township 40S, Range 8E, Section 28, Tax lots 1401 and 1402  
Township 40S, Range 8E, Section 33, Tax lots 100, 101 and 102  
Klamath County (the Property)

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

Claimants submitted the Claim to the State of Oregon under ORS 197.352. Under OAR 125-145-0010 *et seq.*, the Department of Administrative Services (DAS) referred the Claim to the Department of Land Conservation and Development (DLCD) as the regulating entity. This order is based on the record herein, including the Findings and Conclusions set forth in the Final Staff Report and Recommendation of DLCD (the DLCD Report) attached to and by this reference incorporated into this order.

ORDER

The Claim is approved as to laws administered by DLCD and the Land Conservation and Development Commission (LCDC) for the reasons set forth in the DLCD Report, and subject to the following terms:

1. In lieu of compensation under ORS 197.352, the State of Oregon will not apply the following laws to James and Patricia Clark's division of tax lots 1402 and 100 (110 acres) into 5-, 10- and 20-acre parcels, tax lot 101 (100.73 acres) into 20-acre parcels and tax lots 102 and 1401 (120 acres) into 10- to 20-acre parcels (with the total number of parcels for all of the tax lots being 18) or to their development of a dwelling on each parcel: applicable provisions of Goals 3 and 4, ORS 215, OAR 660, divisions 6, and 33; and applicable provisions of Goal 5 and OAR 660, division 16, enacted or adopted after each claimant acquired his or her present ownership interest in 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 the use was permitted when Mr. Clark acquired the subject property on September 25, 1995, and when Ms. Clark acquired an interest in the subject property on December 7, 2001. The department acknowledges

that the relief to which the claimants are entitled under ORS 197.352 will not allow them to use the subject property in the manner set forth in the claim. On September 25, 1995, and December 7, 2001, state laws required a minimum parcel size of 80 acres for the subject property.

2. The action by the State of Oregon provides the state's authorization to the claimants to use the subject property for the use described in this report, subject to the standards in effect on September 25, 1995, and December 7, 2001. On those dates, the subject property was subject to the applicable provisions of Goals 3, 4 and 5; ORS 215; and OAR 660, division 6, 16, and 33, currently 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 subject 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 Manager for the Measure 37 Services Division 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.

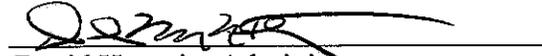
FOR DLCD AND THE LAND  
CONSERVATION AND DEVELOPMENT  
COMMISSION:

Lane Shetterly, Director



Michael Morrissey, Manager  
DLCD, Measure 37 Services Division  
Dated this 2<sup>nd</sup> day of October, 2006.

FOR the DEPARTMENT OF  
ADMINISTRATIVE SERVICES:



David Hartwig, Administrator  
DAS, State Services Division  
Dated this 2<sup>nd</sup> day of October, 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, 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."

**ORS 197.352 (BALLOT MEASURE 37) CLAIM FOR COMPENSATION**  
**OREGON DEPARTMENT OF LAND CONSERVATION AND DEVELOPMENT**  
**Final Staff Report and Recommendation**

October 2, 2006

**STATE CLAIM NUMBERS:** M124877, 124878 and 124879

**NAMES OF CLAIMANTS:** James G. and Patricia M. Clark

**MAILING ADDRESS:** 22674 N. Sowles Road  
Acampo, CA 95220

**PROPERTY IDENTIFICATION:** Township 40S, Range 8E, Section 28  
Tax lots 1401 and 1402  
Township 40S, Range 8E, Section 33  
Tax lots 100, 101 and 102  
Klamath County

**DATE RECEIVED BY DAS:** April 12, 2006

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

**I. SUMMARY OF CLAIM**

The claimants, James and Patricia Clark, seek compensation in the amount of \$882,000 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 subject property consists of tax lots 100, 102, 102, 1401 and 1402. The claimants desire compensation or the right to divide tax lots 1402 and 100 (110 acres) into 5-, 10- and 20-acre parcels, tax lot 101 (100.73 acres) into 20-acre parcels, tax lots 102 and 1401 (120 acres) into 10- to 20-acres parcels (with the total number of parcels for all of the tax lots being 18) and to develop a dwelling on each parcel.<sup>1</sup> The subject property is located at the geographic coordinates listed above, west of Highway 97, near Worden, 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

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<sup>1</sup> The claimants' ORS 197.352 claim filed with the state did not clearly specify the number of desired parcels. However, the materials for the claim addressing reduction in fair market value indicate that the claimants desire to create a total of 18 new parcels consisting of eight parcels from tax lots 100 and 1402, five parcels from tax lot 101, and five parcels from tax lots 1401 and 102.

not apply to James and Patricia Clark's division of tax lots 1402 and 100 (110 acres) into 5-, 10- and 20-acre parcels, tax lot 101 (100.73 acres) into 20-acre parcels and tax lots 102 and 1401 (120 acres) into 10- to 20-acre parcels (with the total number of parcels for all of the tax lots being 18) and to their development of a dwelling on each parcel: applicable provisions of Statewide Planning Goals 3 (Agricultural Lands) and 4 (Forest Lands), ORS 215 and Oregon Administrative Rules (OAR) 660, divisions 6, and 33; and applicable provisions of Goal 5 (Natural Resources, Scenic and Historic Areas, and Open Spaces) and OAR 660, division 16, enacted or adopted after each claimant acquired his or her present ownership interest in 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 Mr. Clark acquired the property September 25, 1995, and when Ms. Clark acquired an interest in the property on December 7, 2001. The department acknowledges that the relief to which the claimants are entitled under ORS 197.352 will not allow them to use the subject property in the manner set forth in the claim (See the complete recommendation in Section VI of this report.)

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

#### **Comments Received**

On July 28, 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, one written comment was received in response to the 10-day notice. The comment does not address whether the claim meets the criterion for relief under ORS 197.352. Comments concerning the effects a use of the subject property may have on the loss of value to surrounding private properties is 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 for instead of waiving a state law. (See the comment letter 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 April 12, 2006, for processing under OAR 125, division 145. The claim identifies Klamath County's Forestry/Range zone and Deer Winter Range (low-median density) Habitat standards 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, James Clark, acquired the subject property on September 25, 1995, as reflected by a bargain and sale deed included with the claim. The claimant, Patricia Clark, acquired an interest in the subject property on December 7, 2001, as reflected by a deed obtained from a title company. The claimants' grandfather, Ben Gay, acquired the subject property on March 14, 1933, as reflected by the deed included with the claim. The claimants have family ownership since 1933. Tax statements submitted with the claim for June 1, 2005, to June 30, 2006, establish the claimants' current ownership of the subject property.

## **Conclusions**

The claimants, James and Patricia Clark, are "owners" of the subject property as that term is defined by ORS 197.352(11)(C). Mr. Clark acquired the subject property on September 25, 1995, and Ms. Clark acquired an interest in the subject property on December 7, 2001. Ben Gay is a "family member" as defined by ORS 197.352(11)(A) and acquired the subject property on March 14, 1933.

### **2. The Laws That are the Basis for This Claim**

In order to establish a valid claim, ORS 197.352(1) requires, in part, that a law must restrict the claimants' use of private real property in a manner that reduces the fair market value of the property relative to how the property could have been used at the time the claimants or a family member acquired the property.

## **Findings of Fact**

The claim indicates that the claimants desire to divide the subject property for residential use, and that this is not allowed by the 80-acre minimum parcel size standards of the county's Forestry/Range (FR) zone and standards for Deer Winter Range (low-median density) Habitat.

The claim is based generally on the applicable provisions of state law that require mixed farm-forest zoning and restrict uses on land zoned mixed farm-forest. The claimants' property is zoned FR by Klamath County, which is a mixed agricultural and forest land zone, as required by Goal 4 and the implementing provisions of OAR 660, division 6 (effective on February 5, 1990), subsequently amended on March 1, 1994, to comply with the provisions of House Bill 3661 (Chapter 792, Oregon Laws 1993).

Under OAR 660-006-0050, all the uses permitted under Goals 3 and 4 are allowed in mixed agriculture and forest zones except that for dwellings, either the Goal 3 or 4 standards are applicable based on the predominant use of the tract on January 1, 1993.<sup>2</sup> Depending on the predominant use on January 1, 1993, the property is subject to either the requirements for dwellings applicable under exclusive farm use zoning required by Goal 3 and OAR 660, division 33, or forest zone provisions required by Goal 4 and OAR 660, division 6.

For land divisions, OAR 660-006-0055 authorizes the creation of new parcels based on the standards applicable to farm or forest zones that implement the minimum lot size specified in ORS 215.780. Under ORS 215.780(2)(a), the minimum lot size in Klamath County's FR zone is 80 acres. The claimants' property cannot be divided into parcels smaller than 80 acres.

The claim is also based on Goal 5 and OAR 660, division 16, applicable to Deer Winter Range Wildlife Habitat, which Klamath County has implemented through Article 57, Significant Resource Overlay (SRO) zone.<sup>3</sup> The claim specifically identifies Section 57.070(C)(1)(a)(1) of the SRO zone as further restricting the use of the subject property by requiring an 80-acre minimum parcel size for the creation of new lots or parcels located within an "impacted (low-medium density) winter range."

The claimants' family first acquired the subject property in 1933, prior to the adoption of the statewide planning goals and their implementing statutes and regulations. No county zoning or overlay zone applied to the subject property in 1933.

## **Conclusions**

The current zoning requirements, minimum lot size and dwelling standards established by applicable provisions of Goals 3, 4 and 5; ORS 215; and OAR 660, divisions 6, 16, and 33, were all enacted or adopted after the claimants' family acquired the subject property. These laws

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<sup>2</sup> No information was provided to the department regarding the predominant use of the subject property on January 1, 1993.

<sup>3</sup> The SRO zone, Article 57 of the Klamath County Land Development Code, was established under the provisions of Goal 5 and OAR 660, division 16 (effective on June 29, 1981), and has not been amended or revised to comply with OAR 660, division 23 (effective on September 1, 1996).

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 \$882,000 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 value determined by the claimants for one lot (\$62,000), multiplied by the number of desired parcels (18 total) and minus the value for the current three parcels (\$62,000 each).

#### **Conclusions**

As explained in Section V.(1) of this report, the claimants are James and Patricia Clark whose family members acquired the subject property in 1933. Under ORS 197.352, the claimants are due compensation for land use regulations that restrict the use of the 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 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 \$882,000.

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 since the claimants' family acquired 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 relative to the uses permitted when the claimants' family acquired the property, including applicable provisions of Goals 3, 4 and 5; ORS 215; and OAR 660, divisions 6, 16, and 33, which Klamath County has implemented through its current FR and SRO zones. 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 division and development of the subject property were in effect when the claimants' family acquired the property on March 14, 1933. 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 \$882,000. However, because the claim does not provide an appraisal or other relevant evidence demonstrating that the land use regulations described in Section V.(2) reduce the fair market value of the subject property, a specific amount of compensation cannot be determined. In order to determine a specific amount of compensation due for this claim, it would also be necessary to verify whether or the extent to which the claimants' desired use of the subject property was allowed under the standards in effect when the claimants' family acquired the property. Nevertheless, based on the record for this claim, the department has determined that the laws on which the claim is based have reduced the fair market value of the subject property to some extent.

No funds have been appropriated at this time for the payment of claims. In lieu of payment of compensation, ORS 197.352 authorizes the department to modify, remove or not apply all or parts of certain land use regulations to allow James and Patricia Clark to use the subject property for a use permitted at the time Mr. Clark acquired the property on September 25, 1995, and Ms. Clark acquired an interest in the subject property on December 7, 2001.

At the time James Clark acquired the subject property on September 25, 1995, and at the time Patricia Clark acquired an interest in the subject property on December 7, 2001, it was zoned FR and SRO by Klamath County and was subject to the current lot size and the dwelling and big game habitat standards under Goals 3, 4 and 5; ORS 215; and OAR 660, divisions 6, 16, and 33, as described above in Section V.(2) of this report.

In addition to the applicable provisions of Goals 3, 4 and 5; ORS 215; and OAR 660, divisions 6, 16, and 33, in effect on September 25, 1995, and December 7, 2001, and other laws in effect when the claimants acquired the subject property, 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. Similarly, this report only addresses the exemptions provided for under ORS 197.352(3) that are clearly applicable given the information provided to the department in the claim. The claimants should be aware that the less information they have provided to the department in their claim, the greater the possibility that there may be additional laws that will later be determined to continue to apply to their use of the subject property.

### **Conclusions**

Based on the record, the department recommends that the claim be approved, subject to the following terms:

1. In lieu of compensation under ORS 197.352, the State of Oregon will not apply the following laws to James and Patricia Clark's division of tax lots 1402 and 100 (110 acres) into 5-, 10- and 20-acre parcels, tax lot 101 (100.73 acres) into 20-acre parcels and tax lots 102 and 1401 (120 acres) into 10- to 20-acre parcels (with the total number of parcels for all of the tax lots being 18) or to their development of a dwelling on each parcel: applicable provisions of Goals 3 and 4, ORS 215, OAR 660, divisions 6, and 33; and applicable provisions of Goal 5 and OAR 660, division 16, enacted or adopted after each claimant acquired his or her present ownership interest in 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 the use was permitted when Mr. Clark acquired the subject property on September 25, 1995, and when Ms. Clark acquired an interest in the subject property on December 7, 2001. The department acknowledges that the relief to which the claimants are entitled under ORS 197.352 will not allow them to use the subject property in the manner set forth in the claim. On September 25, 1995, and December 7, 2001, state laws required a minimum parcel size of 80 acres for the subject property.

2. The action by the State of Oregon provides the state's authorization to the claimants to use the subject property for the use described in this report, subject to the standards in effect on September 25, 1995, and December 7, 2001. On those dates, the subject property was subject to the applicable provisions of Goals 3, 4 and 5; ORS 215; and OAR 660, division 6, 16, and 33, currently 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 subject 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 September 18, 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.