

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. M129608  
(BALLOT MEASURE 37) OF )  
Ernest A. Reinhard, CLAIMANT )

Claimant: Ernest A. Reinhard (the Claimant)

Property: Township 7W, Range 4W, Section 26, Tax lot 3000, Polk 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) 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 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 28<sup>th</sup> day of December, 2006.

FOR THE DEPARTMENT OF  
ADMINISTRATIVE SERVICES:

  
David Hartwig, Administrator  
DAS, State Services Division  
Dated this 28<sup>th</sup> day of December, 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**  
**Final Staff Report and Recommendation**

December 28, 2006

**STATE CLAIM NUMBER:** M129608

**NAME OF CLAIMANT:** Ernest A. Reinhard

**MAILING ADDRESS:** 28727 Pacific Highway S  
Federal Way, Washington 98003

**PROPERTY IDENTIFICATION:** Township 7W, Range 4W, Section 26  
Tax lot 3000  
Polk County

**OTHER CONTACT INFORMATION:** Gregory C. Hansen  
750 Front Street, Suite 100  
Salem, Oregon 97301

**DATE RECEIVED BY DAS:** July 3, 2006

**180-DAY DEADLINE:** December 30, 2006

**I. SUMMARY OF CLAIM**

The claimant, Ernest Reinhard, seeks compensation in the amount of \$4,139,192.40 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 25.26-acre subject property into twenty-four 1.00-acre parcels and one 1.26-acre parcel for commercial and retail development. The subject property is located at 5490 Dallas Highway NW, near Salem, in Polk 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 neither the Land Conservation and Development Commission (the Commission) nor the department has enforced laws that restrict the claimant's use of the private real property relative to uses permitted when the claimant acquired the property, and no laws enforced by the Commission or the department have the effect of reducing the property's fair market value. (See the complete recommendation in Section VI. of this report.)

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

#### **Comments Received**

On October 24, 2006, pursuant to Oregon Administrative Rule (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 July 3, 2006, for processing under OAR 125, division 145. The claim identifies ORS 197.175 and Statewide Planning Goals 3 (Agricultural Lands) and 4 (Forest Lands) 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, Ernest Reinhard, acquired the subject property on December 22, 1967, as reflected by a contract included with the claim. The Polk County Assessor's Office confirms the claimant's current ownership of the subject property.

## **Conclusions**

The claimant, Ernest Reinhard, is an "owner" of the subject property as that term is defined by ORS 197.352(11)(C), as of December 22, 1967.

## **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 divide the 25.26-acre subject property into twenty-four 1.00-acre parcels and one 1.26-acre parcel for commercial and retail development. It indicates the intended use is not allowed under current land use regulations.

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 claimant's property is zoned by Polk County as Farm/Forest (FF), which is a mixed agricultural and forest land zone, as required by Goal 4 and the implementing provisions of OAR 660-006-0050 (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>1</sup> Depending on the predominant use on that date, 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 80-acre minimum lot size specified in ORS 215.780. Under ORS 215.780(2)(a), the minimum lot size in Polk County's FF zone is 40 acres. The claimant's property cannot be divided into parcels smaller than 40 acres.

The claimant acquired the subject property on December 22, 1967, prior to the adoption of statewide planning goals and their implementing statutes and regulations. However, at that time, it was zoned Agriculture, Grazing and Timber-Raising District (AGT) by Polk County, which

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

restricted the use of the property to agricultural, grazing and/or timber use and allowed dwellings only to carry out one of those specified uses. That zone did not allow commercial or retail development, provided that "no variances shall be granted on tracts of five acres or more" and established a variance process for specified uses, not including commercial and retail development, on parcels less than five acres.

### **Conclusions**

The current zoning requirements, minimum lot size and dwelling standards established by Goals 3 and 4, ORS 215 and OAR 660, division 6, were all enacted or adopted since the claimant acquired the property in 1967 and do not allow the claimant's desired division and development. However, based on the record before the department, the claimant's desired use of the subject property was also prohibited by the zoning in effect when he acquired the property in 1967. The claim does not establish any state laws enforced by the Commission or the department that restrict the claimant's desired use of the subject property relative to uses permitted when the claimant acquired the property in 1967.

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

In order to establish a valid claim, ORS 197.352(1) requires that the land use regulations (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 \$4,139,192.40 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 claimant's assessment that the fair market value of the property available for development for commercial use is \$4 per square foot.

#### **Conclusions**

As explained in Section V.(2) of this report, current state land use regulations do not restrict the use of the subject property relative to the uses allowed when the claimant acquired the property in 1967. Land use regulations enacted or adopted by the Commission or the department since the claimant acquired the property do not have the effect of reducing the fair market value of the property relative to uses allowed in 1967 because the claimant's desired use of the property was prohibited by the zoning in effect at the time he 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 including Goals 3 and 4, ORS 215 and OAR 660, division 6, which Polk County has

implemented through its current FF zone. These regulations were enacted or adopted after the claimant acquired the subject property.

### **Conclusions**

It appears that the general statutory, goal and rule restrictions on commercial development and use of the subject property apply to the claimant's desired use of the subject property. These laws were enacted or adopted since the claimant acquired the property; therefore, they are not exempt under ORS 197.352(3)(E). However, as discussed in Section V.(2) of this report, these laws do not restrict the claimant's desired use of the subject property relative to uses permitted when the claimant acquired the property in 1967 because the claimant's desired use was prohibited by the zoning in effect when he acquired the 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.

### **Conclusions**

Based on the record before the department, the claimant, Ernest Reinhard, has not established that he is entitled to relief under ORS 197.352(1), as a result of land use regulations enforced by the Commission or the department. The department recommends that this claim be denied because the claimant's desired use of the property was prohibited under the zoning in effect when he acquired the property in 1967. Neither the Commission nor the department has enforced laws enacted or adopted after the claimant acquired the subject property that restrict the claimant's use of the subject property relative to uses permitted when he acquired the property. Therefore, no laws enforced by the Commission or the department have the effect of reducing the property's fair market value.

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

The department issued its draft staff report on this claim on December 4, 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.