



# Oregon

Theodore R. Kulongoski, Governor

## Department of Land Conservation and Development

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April 19, 2007



To: Interested Persons

From: Lane Shetterly, Director

*Re: Ballot Measure 37 (ORS 197.352) Claim Number M129714*

*Claimant: Richard Buyserie*

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Enclosed, in regard to the above-referenced claim for compensation under Ballot Measure 37 (ORS 197.352), is the Department of Land Conservation and Development's Proposed Amended Final Staff Report and Recommendation.

This Proposed Amended Final Staff Report and Recommendation sets forth the department's evaluation of and recommendation on the claim. Oregon Administrative Rule 125-145-0100(3) provides that the claimant (or the claimant's agent) and any third parties who submitted comments on the claim may submit written comments, evidence, and information in response to any third-party comments contained in the report, and to the staff report and recommendation itself. Such response must be filed no more than ten calendar days after the date of mailing of this report. Any response from you must be delivered to the Oregon Department of Administrative Services (DAS), 1225 Ferry Street SE, U160, Salem, Oregon 97301, and will be deemed timely filed if either postmarked on the tenth day or actually delivered to DAS by the close of business on the tenth day.

This department will review any responses submitted, and an Amended Final Order on the claim will be issued after such review.

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

April 19, 2007

**STATE CLAIM NUMBER:** M129714

**NAME OF CLAIMANT:** Richard Buyserie

**MAILING ADDRESS:** 20794 French Prairie Road NE  
St. Paul, Oregon 97137

**PROPERTY IDENTIFICATION:** Township 4S, Range 2W  
Section 15: tax lots 700 and 800  
Section 16: tax lots 200 and 500  
Marion County

**OTHER CONTACT INFORMATION:** Michael G. Gunn  
PO Box 1046  
Newberg, Oregon 97132

**DATE RECEIVED BY DAS:** July 20, 2006

**180-DAY DEADLINE:** January 16, 2007

**I. SUMMARY OF CLAIM**

The claimant, Richard Buyserie, seeks compensation in the amount of \$2,466,300 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 96 acres of tax lots 500 and 800 into three parcels and to develop a dwelling on each resulting undeveloped parcel and on the 196.75 acres of tax lots 200 and 700 develop a gun club/recreational paintball park.<sup>1</sup> The subject property is located at 20794 French Prairie Road, near St. Paul, in Marion 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

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<sup>1</sup> The subject property includes four tax lots. Tax lot 200 consists of 93 acres; tax lot 500 consists of 33.75 acres; tax lot 700 consists of 103.75; tax lot 800 consists of 62.25 acres. The claim includes a separate desired alternative use for tax lots 700 and 200. The claimant may file a claim pursuant to ORS 197.352(5) based on state land use regulations that apply to and restrict that use with the effect of reducing the property's fair market value, following an application to the county for that use where those regulations are applied as approval criteria.

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 Richard Buyserie's partition of the 96 acres of tax lots 500 and 800 into three parcels and to his development of a dwelling on each resulting undeveloped parcel and on the 196.75 acres of tax lots 200 and 700 development of a gun club/recreational paintball park: applicable provisions of Statewide Planning Goal 3 (Agricultural Lands), ORS 215 and Oregon Administrative Rules (OAR) 660, division 33, enacted or adopted after the claimant acquired each tax lot. 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 that use was permitted when he acquired tax lots 200 and 500 on June 21, 1978, and tax lots 700 and 800 on August 23, 1978. (See the complete recommendation in Section VI. of this report.)

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

#### **Comments Received**

On November 9, 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 July 20, 2006, for processing under OAR 125, division 145. The claim identifies Marion County's comprehensive plan and ordinances 83 and 136, Goals 3 and 4 (Forest Lands), OAR 660-004-0040, 660-004-0018, 660-033-0120 and 660-033-0130 and "ORS 215 and any Oregon Administrative Rules associated with ORS Chapter 215 and other land use regulations" 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, Richard Buyserie, acquired tax lots 200 and 500 on June 21, 1978, and tax lots 700 and 800 on August 23, 1978, as reflected by bargain and sale deeds included with the claim. The Marion County Assessor’s Office confirms the claimant’s current ownership of the subject property.

### **Conclusions**

The claimant, Richard Buyserie, is an “owner” of the subject property as that term is defined by ORS 197.352(11)(C), as of June 21, 1978, for tax lots 200 and 500, and August 23, 1978, for tax lots 700 and 800.

### **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 acquired the property.

### **Findings of Fact**

The claim indicates that the claimant desires to divide the 96 acres of tax lots 500 and 800 into three parcels and to develop a dwelling on each resulting undeveloped parcel and on the 196.75 acres of tax lots 200 and 700 develop a gun club/recreational paintball park. It indicates that the use is not allowed under current land use regulations.<sup>2</sup>

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<sup>2</sup> The claimant summarily lists numerous state land use laws as applicable to this claim, but does not establish how the laws either apply to the claimant’s desired use of the subject property or restrict its use with the effect of reducing its fair market value. On their face, most of the regulations either do not apply to the claimant’s property or do not restrict the claimant’s desired use of the property with the effect of reducing its fair market value. This report addresses only those regulations that the department finds are applicable to and restrict the claimant’s use of the subject property, based on the claimant’s description of the desired use.

The claim is based generally on the applicable provisions of state law that require Exclusive Farm Use (EFU) zoning and restrict uses on EFU-zoned land. The claimant's property is zoned by Marion County as EFU as required by Goal 3, in accordance with ORS 215 and OAR 660, division 33, because the claimant's 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 Goal 3 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 the 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.)

The claimant acquired the subject property after the adoption of the statewide planning goals, but before the Commission acknowledged Marion County's land use regulations to be in compliance with the statewide planning goals pursuant to ORS 197.250 and 197.251. Because the Commission had not acknowledged the county's plan and land use regulations when the claimant acquired tax lots 700 and 800 on August 23, 1978, and tax lots 200 and 500 on June 21, 1978, the statewide planning goals, and Goal 3 in particular, applied directly to the claimant's property when he acquired it.<sup>4</sup>

As adopted on January 25, 1975, Goal 3 required that agricultural land be preserved and zoned for EFU pursuant to ORS 215. The Goal 3 standard for land divisions involving property where the local zoning was not acknowledged required that the resulting parcels must be of a size that

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

<sup>4</sup> The statewide planning goals became effective on January 25, 1975, and were applicable to legislative land use decisions and some quasi-judicial land use decisions prior to the Commission's acknowledgment of each county's comprehensive plan and implementing regulations. *Perkins v. City of Rajneeshpuram*, 300 Or 1 (1985); *Alexanderson v. Polk County*, 289 Or 427, rev. den 290 Or 137 (1980); *Sunnyside Neighborhood Assn. v. Clackamas County*, 280 Or 3 (1977); *Jurgenson v. Union County*, 42 Or App 505 (1979); and *1000 Friends of Oregon v. Benton County*, 32 Or App 413 (1978). After the county's plan and land use regulations were acknowledged by the Commission, the statewide planning goals and implementing rules no longer applied directly to such local land use decisions. *Byrd v. Stringer*, 295 Or 311 (1983). However, statutory requirements continue to apply, and insofar as the state and local provisions are materially the same, the local provisions must be interpreted consistent with the substance of the goals and implementing rules. *Forster v. Polk County*, 115 Or App 475 (1992) and *Kenagy v. Benton County*, 115 Or App 131 (1992).

is “appropriate for the continuation of the existing commercial agricultural enterprise within the area.” Further, ORS 215.263 (1973 edition) only authorized the partition of land subject to EFU zoning, and required that all divisions of land subject to EFU zoning comply with the legislative intent set forth in ORS 215.243 (Agricultural Land Use Policy). Thus, the claimant’s opportunity to divide the subject property when he acquired it in 1978 was limited to land divisions that were consistent with Goal 3, which required that the resulting parcels be (1) appropriate for the continuation of the existing commercial agricultural enterprise in the area and (2) shown to comply with the legislative intent set forth in ORS 215.

Under the Goal 3 standards in effect on June 21, 1978, and August 23, 1978, farm dwellings were allowed if they were determined to be “customarily provided in conjunction with farm use” under ORS 215.213(1)(e) (1973 edition). Non-farm dwellings were subject to compliance with ORS 215.213(3) (1973 edition).

No information has been presented in the claim to establish that the claimant’s desired division of the subject property into nine parcels complies with the “commercial” standard for farm parcels under Goal 3 or the standards for non-farm parcels under ORS 215.263 (1973 edition), nor is there any information to establish that the claimant’s desired development of eight dwellings on the subject property satisfies the standards for farm or non-farm dwellings under ORS 215.213 (1973 edition).

### **Conclusions**

The current zoning requirements, minimum lot size and dwelling standards established by Goal 3, ORS 215 and OAR 660, division 33, do not allow the claimant’s desired division or development of the subject property. However, the claim does not establish whether or the extent to which the claimant’s desired use of the subject property complies with the standards for land divisions and development under the requirements of Goal 3 and ORS 215 in effect when the claimant acquired tax lot 200 and 500 on June 21, 1978, and tax lots 700 and 800 on August 23, 1978.

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 uses 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 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.

### **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 \$2,466,300 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 claimant's assessment of the subject property's value.

### **Conclusions**

As explained in Section V.(1) of this report, the claimant is Richard Buyserie who acquired tax lots 200 and 500 on June 21, 1978, and tax lots 700 and 800 on August 23, 1978. 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 regulations on the fair market value of the subject property is a reduction of \$2,466,300.

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 3, ORS 215 and OAR 660, division 33, which Marion County has implemented through its current EFU zone. With the exception of provisions of Goal 3 and ORS 215 in effect when the claimant acquired tax lots 200 and 500 on June 21, 1978, and tax lots 700 and 800 on August 23, 1978, these 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 with the exception of provisions of Goal 3 and ORS 215 in effect in 1978, the statutory, goal and rule restrictions on division and development of the claimant's property were not in effect when the claimant acquired it, and therefore, these laws are not exempt under ORS 197.352(3)(E). Provisions of Goal 3 and ORS 215 in effect when the claimant acquired the

subject property in 1978 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 also exempt under ORS 197.352(3)(E) and will continue to apply to the claimant's 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 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 uses 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 \$2,466,300. 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 subject 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 Richard Buyserie to use the subject property for a

use permitted at the time he acquired tax lots 200 and 500 on June 21, 1978, and tax lots 700 and 800 on August 23, 1978.

### 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 Richard Buyserie's partition of the 96 acres of tax lots 500 and 800 into three parcels and to his development of a dwelling on each resulting undeveloped parcel and on the 196.75 acres of tax lots 200 and 700 development of a gun club/recreational paintball park: applicable provisions of Goal 3, ORS 215 and OAR 660, division 33, enacted or adopted after the claimant acquired each tax lot. 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 that use was permitted when he acquired tax lots 200 and 500 on June 21, 1978, and tax lots 700 and 800 on August 23, 1978.
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 June 21, 1978, and August 23, 1978. On those dates, the property was subject to applicable provisions of Goal 3 and ORS 215 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 December 18, 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.