

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. M129889, M129891 |
| (BALLOT MEASURE 37) OF         | ) | and M129892                |
| Joseph C. Sheirbon, CLAIMANT   | ) |                            |

Claimant: Joseph C. Sheirbon (the Claimant)

Property: Township 2N, Range 10E, Section 21: tax lot 2900  
Township 2N, Range 10E, Section 27: tax lots 6800 and 6900  
Township 2N, Range 10E, Section 28: tax lots 2000 and 4600  
Hood River Count (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 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 Joseph Sheirbon's development of three additional farm dwellings and accessory structures on each of the tax lots that composes the 79.84-acre subject property: applicable provisions of Goal 3, ORS 215 and OAR 660, division 33, enacted or adopted after March 18, 1987. 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 March 18, 1987.
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 March 18, 1987. On that date, the property was subject to compliance with Goal 3 and OAR 660, division 5, as implemented by Hood River County's acknowledged EFU zone, and the applicable provisions ORS 215 then in effect.

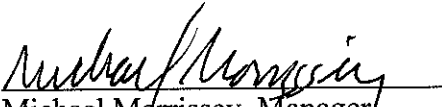
3. To the extent that any law, order, deed, agreement or other legally enforceable public or private requirement provides that the subject property may not be used without a permit, license or other form of authorization or consent, the order will not authorize the use of the property unless the claimant 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 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).

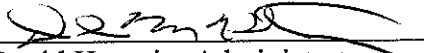
5. Without limiting the generality of the foregoing terms and conditions, in order for the claimant to use the subject property, it may be necessary for him to obtain a decision under ORS 197.352 from a city and/or county and/or metropolitan service district that enforces land use regulations applicable 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 Manager for the Measure 37 Services Division of the DLCDC as a final order of DLCDC 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 DLCDC AND THE LAND  
CONSERVATION AND DEVELOPMENT  
COMMISSION:  
Lane Shetterly, Director

  
Michael Morrissey, Manager  
DLCDC, Measure 37 Services Division  
Dated this 9<sup>th</sup> day of February, 2007.

FOR the DEPARTMENT OF  
ADMINISTRATIVE SERVICES:

  
David Hartwig, Administrator  
DAS, State Services Division  
Dated this 9<sup>th</sup> day of February, 2007.

### 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**

February 9, 2007

**STATE CLAIM NUMBERS:** M129889, M129891 and M129892<sup>1</sup>

**NAME OF CLAIMANT:** Joseph C. Sheirbon

**MAILING ADDRESS:** 4200 Summit Drive  
Hood River, Oregon 97031

**PROPERTY IDENTIFICATION:** Township 2N, Range 10E  
Section 21: tax lot 2900  
Section 27: tax lots 6800 and 6900  
Section 28: tax lots 2000 and 4600  
Hood River County<sup>2</sup>

**OTHER CONTACT INFORMATION:** Steven B. Andersen  
PO Box 135  
Mosier, Oregon 97040

**DATE RECEIVED BY DAS:** August 18, 2006

**180-DAY DEADLINE:** February 14, 2007

**I. SUMMARY OF CLAIM**

The claimant, Joseph Sheirbon, seeks compensation in the amount of \$77,468.25<sup>3</sup> 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 three additional farm dwellings and accessory structures on each of the tax lots that composes the 79.84-acre subject property. Tax lot 2000 is located at 3126 Kollas Road; tax lot 2900 is located on Chamberlin Drive; and tax lots 4600, 6800 and 6900 are located at 3596 and 3599 Lippman Road. The subject property is located near Hood River, in Hood River County. (See claims.)

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<sup>1</sup> The claimant submitted separate claims (M129889, M129891 and M129892) for relief under ORS 197.352. Those claims were consolidated under this review.

<sup>2</sup> The subject property includes five tax lots. Tax lot 2000 consists of 23.44 acres; tax lot 2900 consists of 19.4 acres; tax lot 4600 consists of 17 acres; tax lot 6800 consists of 10 acres; and tax lot 6900 consists of 10 acres.

<sup>3</sup> This amount represents total compensation sought for all tax lots subject to claims M129889, M129891 and M129892.

## 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 this 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 Joseph Sheirbon's development of three additional farm dwellings and accessory structures on each of the tax lots that composes the 79.84-acre subject property: applicable provisions of Statewide Planning Goal 3 (Agricultural Lands), ORS 215 and Oregon Administrative Rules (OAR) 660, division 33, enacted or adopted after March 18, 1987. 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 the property on March 18, 1987. (See the complete recommendation in Section VI. of this report.)

## III. COMMENTS ON THE CLAIM

### Comments Received

On November 22, 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 claims meet the criteria for relief under ORS 197.352. Comments concerning the effects a use of the subject property may have on surrounding areas are generally not something that the department is able to consider in determining whether to waive a state law. If funds do become available to pay compensation, then such effects may become relevant in determining which claims to pay compensation for instead of waive a state law. (See the comment letter in the department's claim files.)

## 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**

The claims were submitted to DAS on August 18, 2006, for processing under OAR 125, division 145. The claims identify Hood River County's Exclusive Farm Use (EFU) zoning ordinance and amendments, including Farm Zone A-2, Interim Farm-Use Protection and High Value Farmland designation (HVF); ORS 197 and 215; and OAR 660, division 33, as the basis for the claims. Only laws that were enacted or adopted prior to December 2, 2004, are the basis for this claim.

## **Conclusions**

The claims have 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 are 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, Joseph Sheirbon, acquired the subject property on March 18, 1987, as reflected by an orchard sales contract and a January 2, 1992, fulfillment warranty deed included with the claims. The Hood River County Assessor's Office confirms the claimant's current ownership of the subject property.

### **Conclusions**

The claimant, Joseph Sheirbon, is an "owner" of the subject property as that term is defined by ORS 197.352(11)(C), as of March 18, 1987.

### **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 claims indicate that the claimant desires to develop three additional farm dwellings and accessory structures on each of the tax lots that composes the 79.84-acre subject property, and that the use is not allowed under current land use regulations.<sup>4</sup>

The claim is based generally on the applicable provisions of state law that require EFU zoning and restrict uses on EFU-zoned land. The claimant's property is zoned EFU-High Value Farmland (HVF) by Hood River County 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>5</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 215.284 and OAR 660, division 33, enacted or adopted pursuant to Goal 3, establish standards for development of dwellings on existing or proposed parcels on EFU-zoned land.

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.)

At the time the claimant acquired the subject property, it was subject to Hood River County's acknowledged EFU zone.<sup>6</sup> When the claimant acquired the subject property, the claimant's desired use of the property would have been governed by the county's acknowledged EFU zone and the applicable provisions of ORS 215 then in effect.<sup>7</sup>

ORS 215.283(1)(f) (1985 edition) generally allowed farm dwellings "customarily provided in conjunction with farm use." Non-farm dwellings were allowed under ORS 215.283(3) if they

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<sup>4</sup> The claimant summarily cites 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 use of the claimant's property in a manner that reduces 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 his desired use.

<sup>5</sup> The claimant's property is "agricultural land" because it contains Natural Resources Conservation Service Class I-IV soils.

<sup>6</sup> Hood River County's EFU zone was acknowledged by the Commission for compliance with Goal 3 on January 11, 1985. At the time the claimant acquired the subject property, it was subject to zoning by Hood River County as EFU, which established 20-acre minimum lot size.

<sup>7</sup> After the county's comprehensive plan and land use regulations were acknowledged by the Commission as complying with the statewide planning goals, the goals and implementing rules no longer applied directly to individual 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).

were determined to be compatible with farm use, not interfere seriously with accepted farm practices, not materially alter the stability of the land use pattern in the area and be situated on generally unsuitable land for the production of farm crops and livestock.

The claim does not establish whether or to what extent the claimant's desired development of the subject property was allowed under the standards in effect when he acquired the property on March 18, 1987.

### **Conclusions**

The current zoning requirements and dwelling standards established by Goal 3, ORS 215 and OAR 660, division 33, were all enacted or adopted after the claimant acquired the subject property in 1987 and do not allow the claimant's desired development of the 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 under Goal 3 and OAR 660, as implemented through Hood River County's comprehensive plan and EFU zone and applicable provisions of ORS 215, in effect when the claimant acquired the property on March 18, 1987.

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 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 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 claims include an estimate of \$77,468.25 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 land use consultant's comparison of properties in Hood River County.

### **Conclusions**

As explained in Section V.(1) of this report, the claimant is Joseph Sheirbon who acquired the subject property on March 18, 1987. 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 \$77,468.25.

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 Hood River County has implemented through its current EFU-HVF zone. With the exception of amendments enacted or adopted after March 18, 1987, Goal 3, ORS 215 and OAR 660 were in effect when the claimant acquired the subject 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 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 on March 18, 1987. Provisions of Goal 3, ORS 215 and OAR 660 in effect when the claimant acquired the subject property in 1987 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 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. 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 claims assert 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 \$77,468.25. However, because the claims do 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 the 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 Joseph Sheirbon to use the subject property for a use permitted at the time he acquired the property on March 18, 1987.

### **Conclusions**

Based on the record, the department recommends that this 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 Joseph Sheirbon's development of three additional farm dwellings and accessory structures on each of the tax lots that composes the 79.84-acre subject property: applicable provisions of Goal 3, ORS 215 and OAR 660, division 33, enacted or adopted after March 18, 1987. 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 March 18, 1987.
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 March 18, 1987. On that date, the property was subject to compliance with Goal 3 and OAR 660, division 5, as

implemented by Hood River County's acknowledged EFU zone, and the applicable provisions 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 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 January 19, 2007. 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.