

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. M129940
(BALLOT MEASURE 37) OF	)	
Gary Wright, CLAIMANT	)	

Claimant: Gary Wright (the Claimant)

Property: Township 3S, Range 2E, Section 14B, Tax lots 702 and 800  
Clackamas 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 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 Gary Wright's division of the 8.21-acre subject property into six 1-acre parcels and one 2-acre parcel for residential development: applicable provisions of Goal 14 and OAR 660-004-0040, enacted or adopted after the claimant acquired each tax lot. 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 tax lot 702 on January 23, 1971, and tax lot 800 on January 15, 1981.
2. The action by the State of Oregon provides the state's authorization to the claimant to use the subject property for the use described in this report, subject to the standards in effect on January 23, 1971, for tax lot 702 and January 15, 1981, for tax lot 800. On January 15, 1981, tax lot 800 was subject to applicable provisions of the statewide planning goals, and in particular, Goal 14 in effect at that time.
3. To the extent that any law, order, deed, agreement or other legally enforceable public or private requirement provides that the subject property may not be used without a permit, license


or other form of authorization or consent, the order will not authorize the use of the property unless the claimant first obtains that permit, license or other form of authorization or consent. Such requirements may include, but are not limited to: a building permit, a land use decision, a "permit" as defined in ORS 215.402 or 227.160, other permits or authorizations from local, state or federal agencies and restrictions on the use of the subject property imposed by private parties.

4. Any use of the subject property by the claimant under the terms of the order will remain subject to the following laws: (a) those laws not specified in (1) above; (b) any laws enacted or enforced by a public entity other than the Commission or the department; and (c) those laws not subject to ORS 197.352 including, without limitation, those laws exempted under ORS 197.352(3).

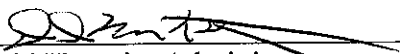
5. Without limiting the generality of the foregoing terms and conditions, in order for the claimant to use the subject property, it may be necessary for him to obtain a decision under ORS 197.352 from a city and/or county and/or metropolitan service district that enforces land use regulations applicable to the property. Nothing in this order relieves the claimant from the necessity of obtaining a decision under ORS 197.352 from a local public entity that has jurisdiction to enforce a land use regulation applicable to a use of the subject property by the claimant.

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

  
\_\_\_\_\_  
Cora R. Parker, Deputy Director  
DLCD  
Dated this 22<sup>nd</sup> day of February, 2007.

FOR the DEPARTMENT OF  
ADMINISTRATIVE SERVICES:

  
\_\_\_\_\_  
David Hartwig, Administrator  
DAS, State Services Division  
Dated this 22<sup>nd</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 22, 2007

**STATE CLAIM NUMBER:** M129940  
**NAME OF CLAIMANT:** Gary Wright  
**MAILING ADDRESS:** 16342 S Moore Road  
Oregon City, Oregon 97045  
**PROPERTY IDENTIFICATION:** Township 3S, Range 2E, Section 14B  
Tax lots 702 and 800  
Clackamas County  
**DATE RECEIVED BY DAS:** August 28, 2006  
**180-DAY DEADLINE:** February 24, 2007

**I. SUMMARY OF CLAIM**

The claimant, Gary Wright, seeks compensation in the amount of \$1 million 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 8.21-acre subject property into six 1-acre parcels and one 2-acre parcel for residential development.<sup>1</sup> The subject property is located at 16342 and 16378 S Moore Road, near Oregon City, in Clackamas County. (See claim.)

**II. SUMMARY OF STAFF RECOMMENDATION**

Based on the findings and conclusions set forth below, the Department of Land Conservation and Development (the department) has determined that the claim is valid. Department staff recommends that, in lieu of compensation, the requirements of the following state laws enforced by the Land Conservation and Development Commission (the Commission) or the department not apply to Gary Wright's division of the 8.21-acre subject property into six 1-acre parcels and one 2-acre parcel for residential development: applicable provisions of Statewide Planning Goal 14 (Urbanization) and Oregon Administrative Rules (OAR) 660-004-0040, enacted or adopted after the claimant acquired each tax lot. 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 tax lot 702 on January 23, 1971, and tax lot 800 on January 15, 1981. (See the complete recommendation in Section VI. of this report.)

<sup>1</sup> The subject property includes two tax lots. Tax lot 702 consists of 6.21 acres and tax lot 800 consists of 2 acres.

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

#### **Comments Received**

On December 5, 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 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 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 August 28, 2006, for processing under OAR 125, division 145. The claim identifies OAR 660-004-0040(7)(a) and (8)(e) 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, Gary Wright, acquired tax lot 702 on January 23, 1971, as reflected by a contract and a September 12, 1988, fulfillment warranty deed included with the claim.

The claimant first acquired an interest in tax lot 800 from James M. Quinn, on May 22, 1978. However, the warranty deed by which Gary Wright acquired the property was subject to a life estate in favor of James Quinn, which reserved in James Quinn the exclusive right to use the property during his lifetime. The claimant’s interest did not provide him with any present right to use tax lot 800 during the term of James Quinn’s life. Gary Wright acquired his present interest and right to use tax lot 800 on January 15, 1981, as evidenced by a death certificate for James Quinn, included with the claim.

The Clackamas County Assessor’s Office confirms the claimant’s current ownership of the subject property.

### Conclusions

The claimant, Gary Wright, is an “owner” of the subject property as that term is defined by ORS 197.352(11)(C), as of January 23, 1971, for tax lot 702 and January 15, 1981, for tax lot 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 or a family member acquired the property.

### Findings of Fact

The claim indicates that the claimant desires to divide the 8.21-acre subject property into six 1-acre parcels and one 2-acre parcel for residential development, and that the use is not allowed under current land use regulations.

The claim is based on the provisions of state law that regulate rural residential zoning. The claimant’s property is zoned by Clackamas County as Rural Residential Farm/Forest 5-Acre (RRFF-5), a rural residential zone. The RRFF-5 zone is consistent with Goal 14, which generally requires that land outside of urban growth boundaries be used for rural uses. Clackamas County’s RRFF-5 zone was adopted on January 12, 1976, and requires a minimum of five acres for the creation of a new lot or parcel.

Goal 14 was effective on January 25, 1975, and requires that local comprehensive plans identify and separate urbanizable land from rural land in order to provide for an orderly and efficient transition from rural to urban land use. In 2000, as a result of a 1986 Oregon Supreme Court decision,<sup>2</sup> the Commission amended Goal 14 and adopted OAR 660-004-0040 (Application of Goal 14 to Rural Residential Areas), which was effective on October 4, 2000.

The rule states that if a county rural residential zone in effect on October 4, 2000, specifies a minimum lot size of two acres or more, the area of any new lot or parcel shall equal or exceed the minimum lot size that is already in effect (OAR 660-004-0040(7)(c)). Some relief from this provision is available for lots or parcels having more than one permanent habitable dwelling pursuant to OAR 660-004-0040(7)(h). The rule also provides that a county's minimum lot size requirement in a rural residential zone shall not be amended to allow a smaller minimum lot size without approval of an exception to Goal 14 (OAR 660-004-0040(6)). Because Clackamas County's RRF-5 zone was in effect on October 4, 2000, and requires a minimum lot size of five acres, the minimum lot size for any new lot or parcel must equal or exceed five acres.

The claimant acquired tax lot 702 in 1971, prior to the adoption of the statewide planning goals and their implementing statutes and rules. At that time, it was zoned by Clackamas County as R-20, which allowed a 20,000-square-foot lot size and permitted dwellings as an outright use.

The claimant acquired tax lot 800 on January 15, 1981, after the adoption of the statewide planning goals, but before the Commission acknowledged Clackamas County's land use regulations to be in compliance with statewide planning goals pursuant to ORS 197.250 and 197.251. Tax lot 800 was recognized as resource land when the claimant acquired it in 1981, and because the Commission had not acknowledged Clackamas County's plan and land use regulations when the claimant acquired the property, the statewide planning goals, and particularly Goals 3 (Agricultural Lands) and 4 (Forest Lands), in addition to Goal 14, would have applied directly to the claimant's property had he sought the desired use at the time he acquired tax lot 800.<sup>3</sup> Alternatively, the claimant would have been required to establish a basis for an exception to compliance with those goals pursuant to the Goal 2 (Land Use Planning) exceptions process. However, through the county's acknowledgement process, tax lot 800 was ultimately acknowledged as exceptions land pursuant to Goal 2, and zoned by the county for rural residential use. Therefore, while the county could now require that the property be evaluated as resource land, as would have been required in 1981, because of the property's ultimate designation as rural residential exceptions land, the county could also require that the claimant's desired use be subject to compliance directly with Goal 14.

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<sup>2</sup> *1000 Friends of Oregon v. LCDC (Curry County)*, 301 Or 447 (1986).

<sup>3</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 land use 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 569 (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 directly applied 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. *Foster v. Polk County*, 115 Or App 475 (1992); *Kenagy v. Benton County*, 115 Or App 131 (1992).

The claim does not establish whether the claimant's desired division of tax lot 800 to create 1- to 2-acre parcels could have satisfied this standard.<sup>4</sup>

### **Conclusions**

The minimum lot size requirements for rural residential lots or parcels established by Goal 14 and OAR 660-004-0040 were adopted since the claimant acquired tax lot 702 in 1971 and tax lot 800 in 1981 and do not allow the desired division of the property. However, when the claimant acquired tax lot 800 in 1981, the statewide planning goals and in particular, the general requirements of Goal 14, applied directly to the property. These regulations restrict the use of the subject property relative to uses permitted when the claimant acquired it.

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 \$1 million 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 of the subject property's value.

### **Conclusions**

As explained in Section V.(1) of this report, the claimant is Gary Wright who acquired tax lot 702 on January 23, 1971, and tax lot 800 on January 15, 1981. 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 \$1 million.

Without an appraisal or other documentation, and without verification of whether or the extent to which the claimant's desired use of the property was allowed under the standards in effect when he acquired it, it is not possible to substantiate the specific dollar amount by which the land use

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<sup>4</sup> When Clackamas County's plan was acknowledged for compliance with Goal 14 on July 10, 1981, the subject property was zoned R-20, which allowed a 20,000-square-foot lot size and permitted dwellings as an outright 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.

#### **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 Goal 14 and OAR 660-004-0040, which Clackamas County has implemented through its RRF-5 zone. With the exception of provisions of Goal 14 adopted before the claimant acquired tax lot 800 on January 15, 1981, both of these land use regulations were adopted after 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. With the exception of provisions of Goal 14 in effect when the claimant acquired tax lot 800, it appears that none of the general goal and rule restrictions on division of rural residential land were in effect when the claimant acquired the subject property in 1971 and 1981. As a result, these laws are not exempt under ORS 197.352(3)(E). Provisions of Goal 14 in effect when the claimant acquired tax lot 800 in 1981 are exempt under ORS 197.352(3)(E), and will continue to apply to tax lot 800.

Other laws in effect when the claimant acquired the subject property, including direct application of the statewide planning goals to tax lot 800, are 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 his 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 \$1 million. However, because the claim does not provide an appraisal or other relevant evidence demonstrating that the land use regulations described in Section V.(2) reduce the fair market value of the subject property, a specific amount of compensation cannot be determined. In order to determine a specific amount of compensation due for this claim, it would also be necessary to verify whether or the extent to which the claimant's desired use of the property was allowed under the standards in effect when he acquired the property. Nevertheless, based on the record for this claim, the department has determined that the laws on which the claim is based have reduced the fair market value of the subject property to some extent.

No funds have been appropriated at this time for the payment of claims. In lieu of payment of compensation, ORS 197.352 authorizes the department to modify, remove or not apply all or parts of certain land use regulations to allow Gary Wright to use the subject property for a use permitted at the time he acquired tax lot 702 on January 23, 1971, and tax lot 800 on January 15, 1981.

### **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 Gary Wright's division of the 8.21-acre subject property into six 1-acre parcels and one 2-acre parcel for residential development: applicable provisions of Goal 14 and OAR 660-004-0040, enacted or adopted after the claimant acquired each tax lot. 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 tax lot 702 on January 23, 1971, and tax lot 800 on January 15, 1981.
2. The action by the State of Oregon provides the state's authorization to the claimant to use the subject property for the use described in this report, subject to the standards in effect on January 23, 1971, for tax lot 702 and January 15, 1981, for tax lot 800. On January 15, 1981, tax lot 800

was subject to applicable provisions of the statewide planning goals, and in particular, Goal 14 in effect at that time.

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 January 29, 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.