



# Oregon

Theodore R. Kulongoski, Governor

## Department of Land Conservation and Development

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March 20, 2007

To: Interested Persons

From: Lane Shetterly, Director



Re: *Ballot Measure 37 (ORS 197.352) Claim Number M130076*  
*Revised Final Staff Report and Revised Final Order*

*Claimants: Patti D. Allen, Mark L. Castor, Dennis N. Castor, and Perri L. Castor*

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Enclosed is a Revised Final Staff Report and Recommendation and Revised Final Order that the department has issued in connection with the above-referenced Ballot Measure 37 claim. This Revised Final Staff Report and Revised Final Order replaces the Final Staff Report and Final Order that was dated March 14, 2007 in the above-referenced Ballot Measure 37 claim.

No response regarding this Amended Final Staff Report is required.

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 )  
COMPENSATION UNDER ORS 197.352 )  
(BALLOT MEASURE 37) OF )  
Patti D. Allen, Mark L. Castor, Dennis N. Castor and )  
Perri L. Casto, CLAIMANTS )

REVISED FINAL ORDER  
CLAIM NO. M130076

Claimants: Patti D. Allen, Mark L. Castor, Dennis N. Castor and Perri L. Casto  
(the Claimants)

Property: Township 5S, Range 2W, Section 1D, Tax lots 2000, 2100 and 2200  
Marion County (the Property)

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

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

ORDER

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

1. In lieu of compensation under ORS 197.352, the State of Oregon will not apply the following laws to the claimants' development of the subject property for non-farm mixed-use retail commercial and high-density residential use: applicable provisions of Goal 3, ORS 215 and OAR 660, division 33, enacted or adopted after March 23, 1988. These laws will not apply to the claimants only to the extent necessary to allow them to use the subject property for the use described in this report, and only to the extent that use was permitted when they acquired it on March 23, 1988. The department acknowledges that the relief to which the claimants are entitled under ORS 197.352 will not allow the claimants to use the subject property in the manner set forth in the claim.

2. The action by the State of Oregon provides the state's authorization to the claimants to use the subject property for the use described in this report, subject to the standards in effect on March 23, 1988. At that time, the property was subject to applicable provisions of Goal 3 and

OAR 660, division 5, as implemented through Marion County's acknowledged EFU zone, and the provisions of 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 claimants first obtain that permit, license or other form of authorization or consent. Such requirements may include, but are not limited to: a building permit, a land use decision, a "permit" as defined in ORS 215.402 or 227.160, other permits or authorizations from local, state or federal agencies and restrictions on the use of the subject property imposed by private parties.

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

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

This Order is entered by the Manager for the Measure 37 Services Division of the DLCD as a final order of DLCD and the Land Conservation and Development Commission under ORS 197.352, OAR 660-002-0010(8), and OAR 125, division 145, and by the Administrator for the State Services Division of the DAS as a final order of DAS under ORS 197.352, OAR 125, division 145, and ORS 293.

FOR DLCD AND THE LAND  
CONSERVATION AND DEVELOPMENT  
COMMISSION:  
Lane Shetterly, Director

  
Michael Morrissey, Manager  
DLCD, Measure 37 Services Division  
Dated this 19<sup>th</sup> day of March, 2007.

FOR the DEPARTMENT OF  
ADMINISTRATIVE SERVICES:

  
David Hartwig, Administrator  
DAS, State Services Division  
Dated this 19<sup>th</sup> day of March, 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**  
**Revised Final Staff Report and Recommendation**

March 19, 2007

**STATE CLAIM NUMBER:** M130076

**NAMES OF CLAIMANTS:** Patti D. Allen  
Mark L. Castor  
Dennis N. Castor  
Perri L. Castor

**MAILING ADDRESSES:**

Patti D. Allen  
3607 SE Umatilla Loop  
Prineville, Oregon 97754

Mark L. Castor  
7052 SE Scenic Drive  
Prineville, Oregon 97754

Dennis N. Castor  
192 Cumming Lane N.  
Keizer, Oregon 97309

Perri L. Castor  
16548 Arney Road NE  
Woodburn, Oregon 97071

**PROPERTY IDENTIFICATION:** Township 5S, Range 2W, Section 1D  
Tax lots 2000, 2100 and 2200  
Marion County

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

**180-DAY DEADLINE:** March 19, 2007

**I. SUMMARY OF CLAIM**

The claimants, Patti Allen and Mark, Dennis and Perri Castor, seek compensation in the amount of \$2.5 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 claimants desire compensation or the right to develop the 17.05-acre subject property<sup>1</sup> for non-farm mixed-use retail commercial

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<sup>1</sup> The subject property includes three tax lots. Tax lot 2000 consists of 10.35 acres; tax lot 2100 consists of 4.7 acres; and tax lot 2200 consists of 2 acres.

and high-density residential use.<sup>2</sup> The subject property is located at 16548 Arney Road NE, west of Interstate Highway 5, near Woodburn, 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 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 the claimants' development of the subject property for non-farm mixed-use retail commercial and high-density residential use: applicable provisions of Statewide Planning Goal 3 (Agricultural Lands), ORS 215 and Oregon Administrative Rules (OAR) 660, division 33, enacted or adopted after March 23, 1988. These laws will not apply to the claimants only to the extent necessary to allow them to use the subject property for the use described in this report, and only to the extent that use was permitted when they acquired it on March 23, 1988. The department acknowledges that the relief to which the claimants are entitled under ORS 197.352 will not allow the claimants to use the subject property in the manner set forth in the claim. (See the complete recommendation in Section VI. of this report.)

## III. COMMENTS ON THE CLAIM

### Comments Received

On December 29, 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

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<sup>2</sup> In a letter dated January 4, 2007, claimant Patti Allen explained that the claimants desire to "designate our area as Commercial and establish a mixed use district." She states that their desired use for the property is a "big box store such as Home Depot, Lowes, and Target with retail outlet stores such as Michels, Mattress Factor, and Mail Box Etc." In a telephone conversation with department staff, Ms. Allen also indicated the claimants may also desire high-density residential use for a portion of the property. ORS 197.352 does not authorize the department to change zoning or allow a re-designation of property. Rather, it authorizes the department to waive certain regulations to allow the claimants to use their property for a use allowed at the time they acquired the property. Consequently, the department cannot consider the claimants' request for re-designation of their property. This review is limited to consideration of the claimants' desired use as described above.

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 September 20, 2006, for processing under OAR 125, division 145. The claim identifies Marion County's Exclusive Farm Use zoning (EFU) 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 claimants, Patti Allen and Mark, Dennis and Perri Castor, acquired the subject property on March 23, 1988, upon the death of their father, Nile W. Castor, as reflected by a death certificate, quitclaim deed and probate documents included with the claim. Nile Castor originally acquired tax lot 2200 on January 9, 1970, as evidenced by a warranty deed included with the claim, and tax lots 2000 and 2100 on May 20, 1973, as evidenced by a title report provided by DAS. The Marion County Assessor's Office confirms the claimants' current ownership of the subject property.

### **Conclusions**

The claimants, Patti Allen and Mark, Dennis and Perri Castor, are "owners" of the subject property as that term is defined by ORS 197.352(11)(C), as of March 23, 1988. The claimants' father, Nile Castor, is a "family member," as defined by ORS 197.352(11)(A), and acquired tax lot 2200 on January 9, 1970, and tax lots 2000 and 2100 on May 20, 1973.

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

In order to establish a valid claim, ORS 197.352(1) requires, in part, that a law must restrict the claimants' use of private real property in a manner that reduces the fair market value of the

property relative to how the property could have been used at the time the claimants or a family member acquired the property.

### **Findings of Fact**

The claim indicates that the claimants desire to develop the 17.05-acre subject property for non-farm mixed-use retail commercial and high-density residential use, and that current zoning prohibits the desired use.

The claim is based generally on the applicable provisions of state law that require EFU zoning and restrict uses on EFU-zoned land. The claimants' property is zoned EFU by Marion County as required by Goal 3, in accordance with ORS 215 and OAR 660, division 33, because the claimants' 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, 215.283, 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 residential and commercial uses on EFU-zoned 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. ORS 215.283(2)(a) allows only commercial activities that are in conjunction with farm use, as described in that section.

OAR 660-033-0120, Table 1 establishes the list of commercial activities allowed on agricultural lands, which is generally restricted to commercial activities in conjunction with farm use. 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 claimants' family first acquired tax lot 2200 in 1970, and tax lots 2000 and 2100 on May 20, 1973, prior to the adoption of the statewide planning goals and their implementing statutes and regulations. No county zoning applied to tax lot 2200 in 1970 or to tax lots 2000 and 2100 on May 20, 1973.

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

## **Conclusions**

The current zoning requirements, minimum lot size, dwelling standards and commercial use standards established by applicable provisions of Goal 3, ORS 215 and OAR 660, division 33, were all enacted or adopted after the claimants' family acquired the subject property. These laws restrict the use of the subject property relative to the uses allowed when the claimants' family acquired the subject property.

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

In order to establish a valid claim, ORS 197.352(1) requires that the land use 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 \$2.5 million as the reduction in the subject property's fair market value due to the regulations that restrict the claimants' desired use of the property. This amount is based on a comparative market analysis included with the claim.

## **Conclusions**

As explained in Section V.(1) of this report, the claimants are Patti Allen and Mark, Dennis and Perri Castor whose family member acquired tax lot 2200 in 1970 and tax lots 2000 and 2100 in 1973. Under ORS 197.352, the claimants are 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 claimants' family acquired the subject property restrict the claimants' desired use of the property. The claimants estimate that the effect of the regulations on the fair market value of the subject property is a reduction of \$2.5 million.

Without an appraisal or other documentation, it is not possible to substantiate the specific dollar amount by which the land use regulations have reduced the fair market value of the subject property. Nevertheless, based on the evidence in the record for this claim, the department determines that the fair market value of the subject property has been reduced to some extent as a result of land use regulations enforced by the Commission or the department since the claimants' family acquired the subject 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 applicable provisions of Goal 3, ORS 215 and OAR 660, division 33, which Marion

County has implemented through its current EFU zone. These land use regulations were enacted or adopted after the claimants' family acquired the subject property.

### **Conclusions**

It appears that none of the general statutory, goal and rule restrictions on residential division and development of the subject property were in effect when the claimants' family acquired tax lot 2200 on January 9, 1970, and tax lots 2000 and 2100 on May 20, 1973. As a result, these laws are not exempt under ORS 197.352(3)(E). Laws in effect when the claimants' family acquired the subject property are exempt under ORS 197.352(3)(E) and do not provide a basis for compensation. In addition, other land use laws enacted or adopted for a purpose set forth in ORS 197.352(3)(A) to (D) are also exempt and would not provide a basis for compensation.

## **VI. FORM OF RELIEF**

ORS 197.352(1) provides for payment of compensation to an owner of private real property if the Commission or the department has enforced one or more laws that restrict the use of the property in a manner that reduces its fair market value. In lieu of compensation, the department may choose to not apply the law in order to allow the present owner to carry out a use of the property permitted at the time the present owner acquired the property. The Commission, by rule, has directed that if the department determines a claim is valid, the Director of the department must provide only non-monetary relief unless and until funds are appropriated by the legislature to pay claims.

### **Findings of Fact**

Based on the findings and conclusions set forth in this report, laws enforced by the Commission or the department restrict the claimants' desired use of the subject property relative to uses permitted when the claimants' family acquired the 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 \$2.5 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 claimants' desired use of the subject property was allowed under the standards in effect when the claimants' family acquired tax lot 2200 on January 9, 1970, and tax lots 2000 and 2100 on May 20, 1973. 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 Patti Allen and Mark, Dennis and Perri Castor to use the subject property for a use permitted at the time they acquired it on March 23, 1988.

When the claimants acquired the subject property on March 23, 1988, it was subject to Marion County's acknowledged EFU zone, which then required a minimum of 60 acres for the creation

of a new parcel and limited uses on EFU-zoned land in compliance with Goal 3 and OAR 660, division 5.<sup>4</sup> When the claimants acquired the subject property, their 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>5</sup> In 1988, ORS 215.283(2)(a) (1987 edition) limited commercial activities in EFU zones to only those commercial uses that were "in conjunction with farm use." ORS 215.263 (1987 edition) required that division of land in EFU zones be "appropriate for the continuation of the existing commercial agricultural enterprise within the area" or not smaller than the minimum size in the county's acknowledged plan. ORS 215.283(1)(f) (1987 edition) generally allowed farm dwellings "customarily provided in conjunction with farm use." Non-farm dwellings were allowed under ORS 215.283(3) if they 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 for farm crops and livestock.

In addition to the provisions of Goal 3, ORS 215 and OAR 660 in effect when the claimants acquired the subject property, there may be other laws that continue to apply to the claimants' use of the property that have not been identified in the claim. 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 claimants have identified. Similarly, this report only addresses the exemptions provided for under ORS 197.352(3) that are clearly applicable given the information provided to the department in the claim. The claimants should be aware that the less information they have provided to the department in the claim, the greater the possibility that there may be additional laws that will later be determined to continue to apply to their use of property.

### **Conclusions**

Based on the record and the foregoing findings and conclusions, 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 the claimants' development of the subject property for non-farm mixed-use retail commercial and high-density residential use: applicable provisions of Goal 3, ORS 215 and OAR 660, division 33, enacted or adopted after March 23, 1988. These laws will not apply to the claimants only to the extent necessary to allow them to use the subject property for the use described in this report, and only to the extent that use was permitted when they acquired it on March 23, 1988. The department acknowledges that the relief to which the claimants are entitled under ORS 197.352 will not allow the claimants to use the subject property in the manner set forth in the claim.

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<sup>4</sup> Marion County's EFU zone was acknowledged for compliance with Goal 3 on June 10, 1982.

<sup>5</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).

2. The action by the State of Oregon provides the state's authorization to the claimants to use the subject property for the use described in this report, subject to the standards in effect on March 23, 1988. At that time, the property was subject to applicable provisions of Goal 3 and OAR 660, division 5, as implemented through Marion County's acknowledged EFU zone, and the provisions of 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 claimants first obtain that permit, license or other form of authorization or consent. Such requirements may include, but are not limited to: a building permit, a land use decision, a "permit" as defined in ORS 215.402 or 227.160, other permits or authorizations from local, state or federal agencies and restrictions on the use of the subject property imposed by private parties.

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

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

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

The department issued its draft staff report on this claim on February 22, 2007. OAR 125-145 0100(3), provided an opportunity for the claimants or the claimants' authorized agent and any third parties who submitted comments under OAR 125-145-0080 to submit written comments, evidence and information in response to the draft staff report and recommendation.