



# Oregon

Theodore R. Kulongoski, Governor

## Department of Land Conservation and Development

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April 2, 2007

To: Interested Persons

From: Lane Shetterly, Director



*Re: Ballot Measure 37 (ORS 197.352) Claim Number M130243*

*Claimants: Wayne C. and Sharon D. Gibbs*

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

This Final Staff Report and Recommendation and the Final Order constitute the final decision on this claim. No further action will be taken on this matter.

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. M130243  
(BALLOT MEASURE 37) OF )  
Wayne C. Gibbs and Sharon D. Gibbs, CLAIMANTS )

Claimants: Wayne C. Gibbs and Sharon D. Gibbs (the Claimants)

Property: Township 37S, Range 5W, Section 18A, Tax lots 2800, 2801 and 2802,  
Josephine 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 Wayne and Sharon Gibbs' division of the 27.17-acre subject property into 13 approximately two-acre parcels: applicable provisions of Goal 14 and OAR 660-004-0040, adopted after the claimants acquired each of the subject tax lots. These land use regulations 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 tax lot 2801 on May 12, 1966, tax lot 2802 on April 15, 1971, and tax lot 2800 on January 9, 1998. The department acknowledges that the relief to which the claimants are entitled under ORS 197.352 may not allow the claimants to use tax lot 2800 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 May 12, 1966, for tax lot 2801, on April 15, 1971, for tax lot 2802 and on January 9, 1998, for tax lot 2800. On January 9, 1998, tax lot 2800 was subject to applicable provisions of Goal 14, as implemented by Josephine County's acknowledged comprehensive plan, 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 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 2<sup>nd</sup> day of April, 2007.

FOR the DEPARTMENT OF  
ADMINISTRATIVE SERVICES:

  
David Hartwig, Administrator  
DAS, State Services Division  
Dated this 2<sup>nd</sup> day of April, 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**

April 2, 2007

**STATE CLAIM NUMBER:** M130243

**NAMES OF CLAIMANTS:** Wayne C. Gibbs  
Sharon D. Gibbs

**MAILING ADDRESS:** PO Box 10  
Murphy, Oregon 97533

**PROPERTY IDENTIFICATION:** Township 37S, Range 5W, Section 18A  
Tax lots 2800, 2801 and 2802  
Josephine County

**OTHER CONTACT INFORMATION:** Max H. Hull  
231 NW B Street  
Grants Pass, Oregon 97526

**DATE RECEIVED BY DAS:** October 10, 2006

**180-DAY DEADLINE:** April 8, 2007

**I. SUMMARY OF CLAIM**

The claimants, Wayne and Sharon Gibbs, seek compensation in the amount of \$1,553,760 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 divide the 27.17-acre subject property<sup>1</sup> into 13 approximately two-acre parcels. The subject property is located at 5943, 5901 and 6005 Williams Highway 238, near Grants Pass, in Josephine 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 Wayne and Sharon Gibbs' division of the 27.17-acre subject property into 13 approximately two-acre parcels: applicable provisions of Statewide Planning Goal 14

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<sup>1</sup> The subject property includes three contiguous tax lots. Tax lot 2800 consists of 11.76 acres; tax lot 2801 consists of 5.51 acres; and tax lot 2802 consists of 9.9 acres.

(Urbanization) and Oregon Administrative Rule (OAR) 660-004-0040, adopted after the claimants acquired each of the subject tax lots. These land use regulations 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 tax lot 2801 on May 12, 1966, tax lot 2802 on April 15, 1971, and tax lot 2800 on January 9, 1998. The department acknowledges that the relief to which the claimants are entitled under ORS 197.352 may not allow the claimants to use tax lot 2800 in the manner set forth in the claim. (See the complete recommendation in Section VI. of this report.)

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

#### **Comments**

OAR 125-145-0100 provides an opportunity for the claimants or the claimants' authorized agent and any third parties to submit written comments, evidence and information in response to the draft staff report and recommendation. Such response must be filed no more than 10 calendar days after the date this report is mailed to the claimants and any third parties. Responses to this draft staff report and recommendation will be considered only as comments related to the claim described in this report.

### **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 October 10, 2006, for processing under OAR 125, division 145. The claim identifies provisions of ORS 215.720 to 215.750 and OAR 660, division 6, 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, Wayne and Sharon Gibbs, acquired tax lot 2801 on May 12, 1966, and tax lot 2802 on April 15, 1971, from Sharon Gibbs’ parents, John W. and Virginia A. Muir, as reflected by warranty deeds included with the claim. The claimants acquired an interest tax lot 2800 on February 14, 1979, from John and Virginia Muir, as reflected by a deed included in the claim. However, the deed by which the claimants acquired the property expressly reserved in John and Virginia Muir a life estate in the property, whereby they reserved in themselves the exclusive right to use the property during their lifetimes. The claimants acquired their present ownership interest and right to use tax lot 2800 following Virginia Muir’s and John Muir’s death on January 9, 1998, as evidenced by death certificates included with the claim. John and Virginia Muir acquired the subject property on August 1, 1944, as evidenced by a warranty deed included with the claim. The Josephine County Assessor’s Office confirms the claimants’ current ownership of the subject property.

### **Conclusions**

The claimants, Wayne and Sharon Gibbs, are “owners” of the subject property as that term is defined by ORS 197.352(11)(C), as of May 12, 1966, for tax lot 2801; as of April 15, 1971, for tax lot 2802; and as of January 9, 1998, for tax lot 2800. Sharon Gibbs’ parents, John and Virginia Muir, are “family members” as defined by ORS 197.352(11)(A), and acquired the subject property on August 1, 1944.

### **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 divide the 27.17-acre subject property into 13 approximately two-acre parcels and that the desired use is not allowed by current land use regulations.<sup>2</sup>

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<sup>2</sup> The claimants summarily list numerous state land use laws as applicable to this claim, but do not establish how the laws either apply to the claimants’ 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 claimants’ property or do not

The claim is based on the provisions of state law that regulate rural residential zoning. The claimants' property is zoned by Josephine County as Rural Residential (RR-5). The RR-5 zone is consistent with Goal 14, which generally requires that land outside of urban growth boundaries be used for rural uses. Josephine County's RR-5 zone was adopted in April 1980 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>3</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 Josephine County's rural residential 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 claimants' family acquired the subject property in 1944, prior to the adoption of the statewide planning goals and their implementing statutes and rules. At that time, the subject property was not zoned by the county.

### **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 claimants' family acquired the subject property in 1944 and do not allow the desired division of the property. These regulations restrict the use of the subject property relative to uses permitted when the claimants' family acquired it.

### **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."

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restrict the use of the claimants' property with the effect of reducing its fair market value. Without any explanation of how these land use regulations apply to the claimants' desired use of the property, the department cannot evaluate how or whether they apply. This report addresses only those regulations that the department finds are applicable to and restrict the claimants' desired use of the subject property, based on the claimants' description of their desired use.

<sup>3</sup> *1000 Friends of Oregon v. LCDC (Curry County)*, 301 Or 447 (1986).

## **Findings of Fact**

The claim includes an estimate of \$1,553,760 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 the claimants' agent's assessment of the value of the subject property.

## **Conclusions**

As explained in Section V.(1) of this report, the claimants are Wayne and Sharon Gibbs whose family members acquired the subject property on August 1, 1944. 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 \$1,553,760.

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 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 Goal 14 and OAR 660-004-0040, which Josephine County has implemented through its RR-5 zone. All of these land use regulations were adopted after the claimants' family acquired the subject property.

## **Conclusions**

It appears that none of the general goal and rule restrictions on residential division and development of the subject property were in effect when the claimants' family acquired the property in 1944. 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. 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 \$1,553,760. 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 property was allowed under the standards in effect when the claimants' family acquired the subject 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 Wayne and Sharon Gibbs to use the subject property for a use permitted at the time they acquired tax lot 2801 on May 12, 1966, tax lot 2802 on April 15, 1971, and tax lot 2800 on January 9, 1998.

The claimants acquired tax lot 2801 in 1966 and tax lot 2802 in 1971, prior to the adoption of the statewide planning goals and their implementing statutes and rules. At that time, these tax lots were not zoned by the county.

When the claimants acquired tax lot 2800 on January 9, 1998, it was subject to Josephine County's acknowledged comprehensive plan. The claimants' use of tax lot 2800 at that time would have been subject to the provisions of the county's comprehensive plan and land use ordinances, including the provision of Goal 14 implemented by those regulations.

The claim does not establish whether or the extent to which the claimants' desired use of tax lot 2800 was permitted under the county's acknowledged comprehensive plan and zoning ordinances in effect when the claimants acquired the tax lot in 1998.

The minimum lot size requirements for rural residential lots or parcels established by Goal 14 and OAR 660-004-0040 were adopted since the claimants acquired tax lot 2801 on May 12, 1966, tax lot 2802 on April 15, 1971, and tax lot 2800 on January 9, 1998, and do

not allow the desired division of the property. These regulations restrict the use of the subject property relative to uses permitted when the claimants acquired it. However, the claim does not establish whether or to what extent the claimants' desired use of tax lot 2800 would have been permitted under the laws in effect in 1998 when the claimants acquired the tax lot.

### 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 Wayne and Sharon Gibbs' division of the 27.17-acre subject property into 13 approximately two-acre parcels: applicable provisions of Goal 14 and OAR 660-004-0040, adopted after the claimants acquired each of the subject tax lots. These land use regulations 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 tax lot 2801 on May 12, 1966, tax lot 2802 on April 15, 1971, and tax lot 2800 on January 9, 1998. The department acknowledges that the relief to which the claimants are entitled under ORS 197.352 may not allow the claimants to use tax lot 2800 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 May 12, 1966, for tax lot 2801, on April 15, 1971, for tax lot 2802 and on January 9, 1998, for tax lot 2800. On January 9, 1998, tax lot 2800 was subject to applicable provisions of Goal 14, as implemented by Josephine County's acknowledged comprehensive plan, 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 March 12, 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.