



# Oregon

Theodore R. Kulongoski, Governor

## Department of Land Conservation and Development

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April 5, 2007

To: Interested Persons

From: Lane Shetterly, Director



*Re: Ballot Measure 37 (ORS 197.352) Claim Number M130291*

*Claimants: Ellen Clibbon, Carolyn Haley, and Michael O'Brien*

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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. M130291  
(BALLOT MEASURE 37) OF )  
Ellen Clibbon, Carolyn Haley, and )  
Michael O'Brien, CLAIMANTS )

Claimants: Ellen Clibbon, Carolyn Haley, and Michael O'Brien (the Claimants)

Property: Township 7N, Range 4W, Section 2, Tax lot 400, Columbia 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 Ellen Clibbon's division of the 65-acre subject property into approximately three parcels, to her development of a dwelling on each parcel and to her development of a landing strip for small planes: applicable provisions of Goal 4, ORS 215 and OAR 660, division 6, enacted or adopted after November 6, 1995. These laws will not apply to Ellen Clibbon only to the extent necessary to allow her to use the subject property for the use described in this report, and only to the extent that use was permitted when she acquired the property on November 6, 1995. The department acknowledges that the relief to which Ellen Clibbon is entitled under ORS 197.352 will not allow her 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 Ellen Clibbon to use the property for the use described in this report, subject to the standards in effect on November 6, 1995. On that date, the property was subject to compliance with Columbia

County's acknowledged forest zone and the applicable provisions of Goal 4, ORS 215 and OAR 660, division 6, currently in effect.

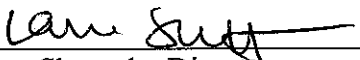
3. To the extent that any law, order, deed, agreement or other legally enforceable public or private requirement provides that the subject property may not be used without a permit, license or other form of authorization or consent, the order will not authorize the use of the property unless Ellen Clibbon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

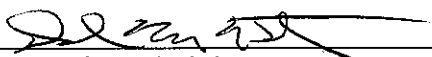
5. Without limiting the generality of the foregoing terms and conditions, in order for Ellen Clibbon to use the subject property, it may be necessary for her to obtain a decision under ORS 197.352 from a city and/or county and/or metropolitan service district that enforces land use regulations applicable to the property. Nothing in this order relieves Ellen Clibbon 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 her use of the subject property.

This Order is entered by the 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  
DLCD  
Dated this 5<sup>th</sup> day of April, 2007.

FOR the DEPARTMENT OF  
ADMINISTRATIVE SERVICES:

  
\_\_\_\_\_  
David Hartwig, Administrator  
DAS, State Services Division  
Dated this 5<sup>th</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 5, 2007

**STATE CLAIM NUMBER:** M130291

**NAMES OF CLAIMANTS:** Ellen Clibbon  
Carolyn Haley  
Michael O'Brien

**MAILING ADDRESSES:** Ellen Clibbon  
7140 Via Montemar  
Gladstone, Oregon 97027-1131

Carolyn Haley  
15715 Southeast Hawthorne Court  
Portland, Oregon 97233-3646

Michael O'Brien  
14203 Southwest Peninsula Drive  
Terrebonne, Oregon 97760-7706

**PROPERTY IDENTIFICATION:** Township 7N, Range 4W, Section 2  
Tax lot 400  
Columbia County

**DATE RECEIVED BY DAS:** October 13, 2006

**180-DAY DEADLINE:** April 11, 2007

**I. SUMMARY OF CLAIM**

The claimants, Ellen Clibbon, Carolyn Haley and Michael O'Brien, seek 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 claimants desire compensation or the right to divide the 65-acre subject property into approximately three parcels, to develop a dwelling on each parcel and to develop a landing strip for small planes.<sup>1</sup> The subject property is located at Route 1 Box 269, near Clatskanie, in Columbia County. (See claim.)

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<sup>1</sup> The claim also indicates that the claimants desire to sell or transfer the newly created parcels for development. In effect, the claimants request that a decision of the department to "not apply" (waive) certain laws as set forth in this report be transferable with the property. ORS 197.352 only authorizes a state agency to waive a law in order to allow the current owner a use of the property permitted at the time that owner acquired the property. A determination of transferability is beyond the scope of relief that the department may grant under ORS 197.352. The Oregon Department of Justice has advised the department that "[i]f the current owner of the real property

## 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 in part. 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 Ellen Clibbon's division of the 65-acre subject property into approximately three parcels, to her development of a dwelling on each parcel and to her development of a landing strip for small planes: applicable provisions of Statewide Planning Goal 4 (Forest Lands), ORS 215 and Oregon Administrative Rules (OAR) 660, division 6, enacted or adopted after November 6, 1995. These laws will not apply to Ellen Clibbon only to the extent necessary to allow her to use the subject property for the use described in this report, and only to the extent that use was permitted when she acquired the property on November 6, 1995. The department acknowledges that the relief to which Ellen Clibbon is entitled under ORS 197.352 will not allow her to use the subject property in the manner set forth in the claim.

The department has further determined that the claim is not valid as to Carolyn Haley and Michael O'Brien because they have not established their ownership of the property. (See the complete recommendation in Section VI. of this report.)

## III. COMMENTS ON THE CLAIM

### Comments Received

On February 26, 2007, 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, two written comments were received in response to the 10-day notice.

The comments do 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 letters 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

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conveys the property before a new use allowed by the public entity is established, then the entitlement to relief will be lost."

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 13, 2006, for processing under OAR 125, division 145. The claim identifies ORS 183 and 197.040, provisions of ORS 215 and OAR 660 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**

Claimant Ellen Clibbon acquired the subject property on November 6, 1995, as a successor trustee of the O’Brien Trust, as reflected by a successor trustee’s notice included with the claim. Ellen Clibbon’s parents acquired the subject property on April 19, 1944, as evidenced by a deed included with the claim, and later transferred the property to the O’Brien Trust, as reflected by a declaration of trust included with the claim.<sup>2</sup> The claim does not establish when or if claimants Carolyn Haley and Michael O’Brien acquired the subject property and does not include copies of deeds or otherwise establish that they are owners of the subject property. The Columbia County Assessor’s Office confirms Ellen Clibbon’s current ownership of the subject property.

### **Conclusions**

Claimant Ellen Clibbon is an “owner” of the subject property as that term is defined by ORS 197.352(11)(C), as of November 6, 1995. Ellen Clibbon’s parents are “family members” as defined by ORS 197.352(11)(A) and acquired the subject property on April 19, 1944. Claimants Carolyn Haley and Michael O’Brien have not established that they are “owners” of the subject property as that term is defined in ORS 197.352(11)(C).

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<sup>2</sup> Transfer of property to a revocable trust does not result in a change in ownership for purposes of ORS 197.352.

## **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 65-acre subject property into approximately three parcels, to develop a dwelling on each parcel and to develop a landing strip for small planes and that the desired use is not allowed under current state land use regulations.<sup>3</sup>

The claim is based generally on the applicable provisions of state law that require forest zoning and restrict uses on forest-zoned land. The subject property is zoned PF 76 by Columbia County as required by Goal 4 in accordance with ORS 215 and OAR 660, division 6, because the subject property is "forest land" under Goal 4. Goal 4 became effective on January 25, 1975, and requires that forest land be zoned for forest use (see statutory and rule history under OAR 660-015-0000(4)). The forest land administrative rules (OAR 660, division 6) became effective on September 1, 1982, and ORS 215.705 to 215.755 and 215.780 became effective on November 4, 1993 (Chapter 792, Oregon Laws 1993). OAR 660-006-0026 and 660-006-0027 were amended on March 1, 1994, to implement those statutes.

Together, ORS 215.705 to 215.755 and 215.780 and OAR 660, division 6, enacted or adopted pursuant to Goal 4, prohibit the division of forest land into parcels less than 80 acres and establish standards for development of dwellings on existing or proposed parcels on those lands.

Ellen Clibbon's family acquired the subject property on April 14, 1944, prior to the adoption of the statewide planning goals and their implementing statutes and regulations.

### **Conclusions**

The current zoning requirements, minimum lot size and dwelling standards established by Goal 4, ORS 215.705 to 215.755 and 215.780 and OAR 660-006-0026 and 660-006-0027 were all enacted or adopted after Ellen Clibbon's family acquired the subject property in 1944 and do not allow the desired division or development of the property. These laws restrict the use of the property relative to the uses permitted when her family acquired the property.

As explained in Section V.(1) of this report, Carolyn Haley and Michael O'Brien have not established that they are "owners" of the subject property as that term is defined by ORS 197.352(11)(C). Without such demonstration, it is not possible to determine that any laws

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<sup>3</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 subject property or do not restrict the use of the 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.

enforced by the Commission or the department restrict their use of private real property with the effect of reducing the fair market value of the 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 \$1 million as the reduction in the subject’s property’s fair market value due to regulations that restrict the claimants’ desired use of the property. This amount is based on a realtor’s opinion included with the claim.

#### **Conclusions**

As explained in Section V.(1) of this report, the claimants are Ellen Clibbon, whose family acquired the subject property on April 19, 1944, and Carolyn Haley and Michael O’Brien. Carolyn Haley and Michael O’Brien have not established their ownership of the subject property. Therefore, the department can make no determination on the effect of any land use regulations on the fair market value of the subject property as to those claimants.

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 Ellen Clibbon’s 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 property is a reduction of \$1 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 Ellen Clibbon’s 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 applicable provisions of Goal 4, ORS 215 and OAR 660, division 6, which Columbia County has implemented through its current PF 76 zone. All of these land use regulations were enacted or adopted after Ellen Clibbon’s family acquired the subject property.

## **Conclusions**

It appears that the general statutory, goal and rule restrictions on residential division and development of the subject property are not exempt under ORS 197.352(3)(E) to the extent they were enacted or adopted after Ellen Clibbon's family acquired the property. Provisions of Goal 4, ORS 215 and OAR 660, division 6, in effect when Ellen Clibbon's family acquired the subject property in 1944 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.

As explained in Section V.(1) of this report, Carolyn Haley and Michael O'Brien have not established that they are "owners" of the subject property as that term is defined in ORS 197.352(11)(C). Without such demonstration, the department can make no determination as to whether any land use laws are exempt from ORS 197.352.

## **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 current 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 do not restrict Carolyn Haley and Michael O'Brien's desired use of the subject property because they have not demonstrated their ownership of the subject property. The department has further determined that laws enforced by the Commission or the department restrict Ellen Clibbon'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 claimants' desired use of the subject property was allowed under the standards in effect when Ellen Clibbon's family 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 Ellen Clibbon to use the subject property for a use permitted at the time she acquired the property on November 6, 1995. At that time, the property

was subject to applicable provisions of Goal 4, ORS 215 and OAR 660, division 6, currently in effect.

In addition to the provisions of Goal 4, ORS 215 and OAR 215 and OAR 660, division 6, in effect when Ellen Clibbon acquired the property, there may be other laws that continue to apply to her use of the property that have not been identified in the claim. The department notes that ORS 215.730 and OAR 660, division 6, include standards for siting dwellings in forest zones. These provisions include fire protection standards for dwellings and for surrounding forest lands. ORS 197.352(3)(B) specifically exempts regulations “restricting or prohibiting activities for the protection of public health and safety, such as fire and building codes. . . .” Accordingly, siting standards for dwellings in forest zones in ORS 215.730 and OAR 660, division 6, are exempt under ORS 197.352(3)(B).

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 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 Ellen Clibbon’s use of the subject property.

### **Conclusions**

Based on the record and foregoing findings and conclusions, claimants Carolyn Haley and Michael O’Brien have not established that they are entitled to relief under ORS 197.352(1) as a result of land use regulations enforced by the Commission or the department because they have not established that they are “owners” of the subject property. Therefore, the department recommends that the claim be denied as to Carolyn Haley and Michael O’Brien.

The department further recommends that the claim be approved as to Ellen Clibbon, 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 Ellen Clibbon’s division of the 65-acre subject property into approximately three parcels, to her development of a dwelling on each parcel and to her development of a landing strip for small planes: applicable provisions of Goal 4, ORS 215 and OAR 660, division 6, enacted or adopted after November 6, 1995. These laws will not apply to Ellen Clibbon only to the extent necessary to allow her to use the subject property for the use described in this report, and only to the extent that use was permitted when she acquired the property on November 6, 1995. The department acknowledges that the relief to which Ellen Clibbon is entitled under ORS 197.352 will not allow her 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 Ellen Clibbon to use the property for the use described in this report, subject to the standards in effect on November 6, 1995. On that date, the property was subject to compliance with Columbia County’s acknowledged forest zone and the applicable provisions of Goal 4, ORS 215 and OAR 660, division 6, currently 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 Ellen Clibbon 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 Ellen Clibbon 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 Ellen Clibbon to use the subject property, it may be necessary for her 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 Ellen Clibbon 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 her use of the subject property.

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

The department issued its draft staff report on this claim on March 15, 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.