



# Oregon

Theodore R. Kulongoski, Governor

## Department of Land Conservation and Development

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April 19, 2007

To: Interested Persons

From: Lane Shetterly, Director



*Re: Ballot Measure 37 (ORS 197.352) Claim Number M130446*

*Claimant: Charles Anderson*

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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. M130446  
(BALLOT MEASURE 37) OF )  
Charles Anderson, CLAIMANT )

Claimant: Charles Anderson (the Claimant)

Property: Township 18S, Range 12E, Section 4CD: tax lot 1100, Section 9B: tax lot 100,  
Deschutes 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 Charles Anderson's division of an approximately 5.02-acre portion of the 49.96-acre subject property, currently designated as an "Area of Special Interest," into parcels consistent with the requirements of the City of Bend's RS and RM zones: applicable provisions of Goal 5 and OAR 660, divisions 16, and 23, enacted or adopted after January 11, 1985. These land use regulations will not apply to the claimant only to the extent necessary to allow him to use the 5.02-acre portion for the use described in this report, and only to the extent that use was permitted when he acquired the property on January 11, 1985.
2. The action by the State of Oregon provides the state's authorization to the claimant to use the 5.02-acre portion of the subject property for the use described in this report, subject to the standards in effect on January 11, 1985. On that date, the property was subject to applicable provisions of Goal 5 and OAR 660, division 16, 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

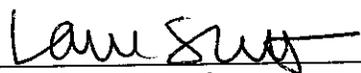
or other form of authorization or consent, the order will not authorize the use of the 5.02-acre portion unless the claimant first obtains that permit, license or other form of authorization or consent. Such requirements may include, but are not limited to: a building permit, a land use decision, a "permit" 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 5.02-acre portion 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 5.02-acre portion of 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 5.02-acre portion by the claimant.

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 19<sup>th</sup> day of April, 2007.

FOR the DEPARTMENT OF  
ADMINISTRATIVE SERVICES:

  
David Hartwig, Administrator  
DAS, State Services Division  
Dated this 19<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 19, 2007

**STATE CLAIM NUMBER:** M130446

**NAME OF CLAIMANT:** Charles Anderson

**MAILING ADDRESS:** 1404 NE 3rd Street  
Bend, Oregon 97701

**OTHER CONTACT INFORMATION:** Martin E. Hansen  
1148 NW Hill Street  
Bend, Oregon 97701

**PROPERTY IDENTIFICATION:** Township 18S, Range 12E,  
Section 4CD: tax lot 1100  
Section 9B: tax lot 100  
Deschutes County

**DATE RECEIVED BY DAS:** October 26, 2006

**180-DAY DEADLINE:** April 24, 2007

**I. SUMMARY OF CLAIM**

The claimant, Charles Anderson, seeks compensation in the amount of \$3,263,000 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 5.02-acre portion of the 49.96-acre subject property,<sup>1</sup> currently designated as an "Area of Special Interest," in accordance with the City of Bend's minimum lot size requirements for its standard and medium density residential zones (RS and RM zones).. The subject property is located at 20575 Reed Market Road within the city limits of Bend. (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 Charles Anderson's division of an approximately 5.02-acre portion of the 49.96-acre subject property, currently designated as an "Area of Special Interest," into parcels consistent

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<sup>1</sup> The subject property includes two tax lots. Tax lot 100 is 40 acres and tax lot 1100 is 9.96 acres.

with the requirements of the City of Bend's RS and RM zones: applicable provisions of Statewide Planning Goal 5 (Natural Resources, Scenic and Historic Areas, and Open Spaces) and OAR 660, divisions 16, and 23. These land use regulations will not apply to the claimant only to the extent necessary to allow him to use the 5.02-acre portion of the subject property for the use described in this report, and only to the extent that use was permitted when he acquired the property on January 11, 1985. (See the complete recommendation in Section VI of this report.)

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

#### **Comments Received**

On March 6, 2007, pursuant to Oregon Administrative Rules (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 October 26, 2006, for processing under OAR 125, division 145. The claim identifies "ORS 197.225 and OAR 660-015-0000(5)" (Goal 5) as restricting the claimant's desired use of the property. 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, Charles Anderson, acquired the subject property on January 11, 1985, as reflected by the warranty deed included with the claim. The Deschutes County Assessor’s Office confirms the claimant’s current ownership of the subject property.

### **Conclusions**

The claimant, Charles Anderson, is an “owner” of the subject property as that term is defined by ORS 197.352(11)(C), as of January 11, 1985.

### **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 a 5.02-acre portion of the 49.96-acre subject property, currently designated as an “Area of Special Interest,” into parcels consistent with the requirements of the City of Bend’s RS and RM zones, and that current land use regulations prohibit the desired use.

The subject property is within the City of Bend and its Urban Growth Boundary (UGB). The 49.96-acre subject property is currently zoned RS and with 5.02 acres designated as an “Area of Special Interest.” The maximum density in the RS zone is generally 7.3 units per gross acre, and the maximum density in the RM zone is generally 21.7 units per gross acre.

In general, the zoning of a particular property within a UGB is determined by the city or county with land use jurisdiction over the property. In some circumstances, the Commission’s rules or state statutes may apply to a local government decision regarding zoning, but usually, within a

city or UGB, state laws require or encourage a higher intensity of development rather than restrict the use of real property.

In this case, approximately 5.02 acres of the claimant's property is subject to the City of Bend's Area of Special Interest designation, which was acknowledged in 2003 in order to implement Goal 5.<sup>2</sup> Under Goal 5, as adopted and effective January 25, 1975, local governments were required to inventory land and adopt programs to protect natural resources and to conserve scenic, historic and open space resources. Prior to adoption of local government programs, the requirements of Goal 5 were directly applicable to individual properties through the land use application process. Specifically, Goal 5 required applicants to establish how the natural resources, scenic and historic areas and open space resources on individual properties would be protected through the proposed development. Under OAR 660, division 16, requirements and application procedures for complying with Goal 5 became effective on June 29, 1981. OAR 660, division 23, established additional procedures and requirements for complying with Goal 5, and became effective on September 1, 1996.

The claim does not establish whether or the extent to which the claimant's desired development of the 5.02-acre portion of the subject property designated as an Area of Special Interest complies with the standards of Goal 5 and OAR 660, division 16, in effect when they acquired the property in 1985. The claim also does not establish the extent to which Goal 5 and OAR 660, division 23, restrictions or procedures implemented after the claimant acquired the property restrict the claimant's desired development of the 5.02-acre portion.

### **Conclusions**

The current zoning requirements established by amendments to Goal 5 and OAR 660, division 23, were adopted after the claimant acquired the subject property in 1985 and do not allow the desired division of the property. These regulations may restrict the use of the 5.02-acre portion of the subject property designated as an Area of Special Interest relative to uses permitted when the claimant acquired the property. However, the claim does not establish whether or to what extent the claimant's desired use of the 5.02-acre portion complies with the standards for development under Goal 5 and OAR 660, division 16, applicable and in effect when the claimant acquired the property on January 11, 1985. Nor does the claim establish whether or the extent to which the requirements or procedures of Goal 5 and OAR 660, division 23, adopted after the claimant acquired the property restricts the claimant's desired use of the 5.02-acre portion.

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 apply to the claimant's desired use of the subject property that have not been identified.

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<sup>2</sup> The City of Bend's Area of Special Interest designation was acknowledged by the Department for compliance with Goal 5 on June 6, 2003, pursuant to ORS 197.628.

### **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 \$3,263,000 as the reduction in the subject property’s fair market value due to the regulations that restrict the claimant’s desired use of the subject property. This amount is based on the claimant’s assessment of the property’s value..

#### **Conclusions**

As explained in Section V.(1) of this report, the claimant is Charleston Anderson, who acquired the subject property on January 11, 1985. Under ORS 197.352, the claimant is due compensation for land use regulations that restrict the use of the 5.02-acre portion of the subject property designated as an Area of Special Interest and have the effect of reducing the 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 5.02-acre portion of the property may restrict his desired use of that portion. The claimant estimates that the effect of the regulations on the fair market value of the subject property is a reduction of \$3,263,000.

Without an appraisal or other documentation, and without verification of whether or the extent to which the claimant’s desired use of the 5.02-acre portion of the subject property has been restricted by land use regulations enacted or adopted after he acquired the property, it is not possible to substantiate the specific dollar amount by which the land use regulations have reduced the fair market value of the subject property. Nevertheless, based on the evidence in the record for this claim, the department determines that the fair market value of the 5.02-acre portion 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, specifically Goal 5 and OAR 660, division 23, which the City of Bend has implemented through its Area of Special Interest designation. With the exception of amendments adopted after 1985, these land use regulations were in effect when the claimant acquired the subject property.

#### **Conclusions**

Without a specific development proposal for the subject property, it is not possible for the department to determine all the laws that may apply to a particular use of the property, or

whether those laws may fall under one or more of the exemptions under ORS 197.352. It appears that the statutory, goal and rule restrictions on residential development of 5.02-acre portion of the subject property are not exempt under ORS 197.352(3)(E) only to the extent they were enacted or adopted after the claimant acquired the property on January 11, 1985. Provisions of Goal 5 and OAR 660, division 16, in effect when the claimant acquired the subject property in 1985 are exempt under ORS 197.352(3)(E) and will continue to apply to the 5.02-acre portion of the property.

Other laws in effect when the claimant acquired the subject property are exempt under ORS 197.352(3)(E) and will continue to apply to his use of the property. In addition, ORS 197.352(3)(B) specifically exempts regulations "restricting or prohibiting activities for the protection of public health and safety. . . ." To the extent that provisions of the City of Bend's Area of Special Interest designation complies with the standards of Goal 5 for public health and safety, those provisions would be exempt under ORS 197.352(3)(B).

There may be other laws that 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 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, the department has determined laws enforced by the Commission or the department restrict the claimant's desired use of the 5.02-acre portion 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 \$3,263,000. 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 5.02-acre portion 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 5.02-acre portion 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 Charles Anderson to use the 5.02-acre portion of the subject property for a use permitted at the time he acquired the property on January 11, 1985.

### **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 Charles Anderson's division of an approximately 5.02-acre portion of the 49.96-acre subject property, currently designated as an "Area of Special Interest," into parcels consistent with the requirements of the City of Bend's RS and RM zones: applicable provisions of Goal 5 and OAR 660, divisions 16, and 23, enacted or adopted after January 11, 1985. These land use regulations will not apply to the claimant only to the extent necessary to allow him to use the 5.02-acre portion for the use described in this report, and only to the extent that use was permitted when he acquired the property on January 11, 1985.
2. The action by the State of Oregon provides the state's authorization to the claimant to use the 5.02-acre portion of the subject property for the use described in this report, subject to the standards in effect on January 11, 1985. On that date, the property was subject to applicable provisions of Goal 5 and OAR 660, division 16, 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 5.02-acre portion 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 5.02-acre portion 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 5.02-acre portion of 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 5.02-acre portion by the claimant.

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

The department issued its draft staff report on this claim on March 30, 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.