



# Oregon

Theodore R. Kulongoski, Governor

## Department of Land Conservation and Development

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April 20, 2007

To: Interested Persons

From: Lane Shetterly, Director



*Re: Ballot Measure 37 (ORS 197.352) Claim Number M130462*

*Claimants: Myron H. Curtis, Carlene L. Schiever, and Carmelia L. Pierson.*

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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 A
COMPENSATION UNDER ORS 197.352	)	CLAIM NO. M130462
(BALLOT MEASURE 37) OF	)	
Myron H. Curtis, Carlene H. Schreiver	)	
Camelia L. Pierson (formerly known as	)	
Camelia Goetz), CLAIMANTS	)	

Claimants: Myron H. Curtis, Carlene H. Schreiver, Camelia L. Pierson (formerly known as Camelia Goetz) (the Claimants)

Property: Township 1S, Range 2E, Section 9AD: tax lots 400 and 600; Section 10B: tax lot 900, City of Portland, Multnomah 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 department has determined that the claim is not valid as to tax lots 400, 600 and 900 that are not in environmental zones, because the claimants' desired use of that portion of the subject property is not restricted by any state land use regulations. The Claim is denied as to laws administered by DLCD and the Land Conservation and Development Commission (LCDC) for the reasons set forth in the DLCD Report.

The Department recommends that the claim be approved for Myron Curtis, Carlene Schreiver and Camelia Pierson, as to those portions of tax lots 400, 600 and 900 within the City of Portland's Environmental Conservation and Protection overlay zones. 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 Myron Curtis's, Carlene Schreiver's and Camelia Pierson's division of the portions of tax lots 400, 600 and 900 in the City of Portland's environmental zones into 7,000- to 10,000-square-foot parcels and to their development of a dwelling on each resulting parcel: applicable provisions and amendments of Goal 5 and OAR 660, divisions 16, and 23, adopted after each

claimant acquired the subject property. 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 Myron Curtis acquired tax lot 600 on November 19, 1974, and tax lots 400 and 900 on October 7, 1983, and only to the extent that use was permitted when Carlene Schreiber and Camelia Pierson acquired tax lots 400, 600 and 900 on January 23, 1999. The department acknowledges that the relief to which Carlene Schreiber and Camelia Pierson are entitled under ORS 197.352 will not allow them 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 portions of tax lots 400, 600 and 900 located within an environmental zone for the use described in this report, subject to the standards in effect when Myron Curtis acquired tax lot 600 on November 19, 1974, and tax lots 400 and 900 on October 7, 1983, and when Carlene Schreiber and Camelia Pierson acquired tax lots 400, 600 and 900 on January 23, 1999. On November 19, 1974, tax lot 600 was subject to the applicable provisions of ORS 215 then in effect, including the interim planning goals set forth in ORS 215.515 (1973 edition.) On October 7, 1983, tax lots 400 and 900 were subject to applicable provisions of Goal 5 and OAR 660, division 16, then in effect. On January 23, 1999, tax lots 400, 600 and 900 were subject to applicable provisions of Goal 5 and OAR 660, divisions 16, and 23, 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 subject 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 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 portions of tax lots 400, 600 and 900, 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 claimant from the necessity of obtaining a decision under ORS 197.352 from a local public entity that has jurisdiction to enforce a land use regulation applicable to a use of the subject property by the 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 20<sup>th</sup> day of April, 2007.

FOR the DEPARTMENT OF  
ADMINISTRATIVE SERVICES:

  
David Hartwig, Administrator  
DAS, State Services Division  
Dated this 20<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."

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 B  
COMPENSATION UNDER ORS 197.352 ) CLAIM NO. M130462  
(BALLOT MEASURE 37) OF )  
Myron H. Curtis, Carlene H. Schreiber )  
Camelia L. Pierson (formerly known as )  
Camelia Goetz ), CLAIMANTS )

Claimants: Myron H. Curtis, Carlene H. Schreiber, Camelia L. Pierson (formerly known as Camelia Goetz ) (the Claimants)

Property: Township 1S, Range 2E,  
Section 9DA: tax lots 100, 200, 2000, 2100, 2200 and 2300  
Section 10B: tax lot and 1000  
City of Portland, Multnomah County (the Property)

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

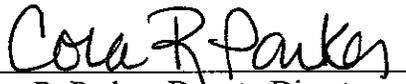
Claimants submitted the Claim to the State of Oregon under ORS 197.352. Under OAR 125-145-0010 *et seq.*, the Department of Administrative Services (DAS) referred the Claim to the Department of Land Conservation and Development (DLCD) as the regulating entity. This order is based on the record herein, 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 denied as to laws administered by DLCD and the Land Conservation and Development Commission (LCDC) for the reasons set forth in the DLCD Report.

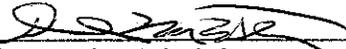
This Order is entered by the Director of the DLCD as a final order of DLCD and the Land Conservation and Development Commission under ORS 197.352, OAR 660-002-0010(8), and OAR chapter 125, division 145, and by the Administrator for the State Services Division of the DAS as a final order of DAS under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

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



Cora R. Parker, Deputy Director  
DLCD  
Dated this 20<sup>th</sup> day of April, 2007.

FOR THE DEPARTMENT OF  
ADMINISTRATIVE SERVICES:



David Hartwig, Administrator  
DAS, State Services Division  
Dated this 20<sup>th</sup> day of April, 2007.

**NOTICE OF RIGHT TO APPEAL OR OTHER JUDICIAL RELIEF**

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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)

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 C  
COMPENSATION UNDER ORS 197.352 ) CLAIM NO. M130462  
(BALLOT MEASURE 37) OF )  
Mylo E. Curtis, CLAIMANT )

Claimant: Mylo E. Curtis (the Claimant)

Property: Township 1S, Range 2E, Section 9AD: tax lots 400 and 600  
Section 9DA: tax lots 100, 200, 2000, 2100, 2200 and 2300  
Section 10B: tax lots 900 and 1000  
City of Portland, Multnomah 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

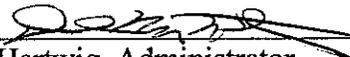
The Claim is denied as to laws administered by DLCD and the Land Conservation and Development Commission (LCDC) for the reasons set forth in the DLCD Report.

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 chapter 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 chapter 125, division 145, and ORS chapter 293.

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

  
Cora R. Parker, Deputy Director  
DLCD  
Dated this 20<sup>th</sup> day of April, 2007.

FOR THE DEPARTMENT OF  
ADMINISTRATIVE SERVICES:

  
David Hartwig, Administrator  
DAS, State Services Division  
Dated this 20<sup>th</sup> day of April, 2007.

**NOTICE OF RIGHT TO APPEAL OR OTHER JUDICIAL RELIEF**

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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)

**ORS 197.352 (BALLOT MEASURE 37) CLAIM FOR COMPENSATION**  
**OREGON DEPARTMENT OF LAND CONSERVATION AND DEVELOPMENT**  
**Final Staff Report and Recommendation**

April 20, 2007

**STATE CLAIM NUMBER:** M130462

**NAMES OF CLAIMANTS:** Myron H. Curtis  
Carlene H. Schreiver  
Camelia L. Pierson (formerly known as  
Camelia Goetz)  
Mylo E. Curtis

**MAILING ADDRESS:** 10177 SE Powell Boulevard  
Portland, Oregon 97266-1812

**PROPERTY IDENTIFICATION:** Township 1S, Range 2E,  
Section 9AD: tax lots 400 and 600  
Section 9DA: tax lots 100, 200, 2000, 2100,  
2200 and 2300  
Section 10B: tax lots 900 and 1000  
City of Portland  
Multnomah County

**OTHER CONTACT INFORMATION:** Mark P. O'Donnell  
O'Donnell & Clark LLP  
1650 NW Naito Parkway, Suite 302  
Portland, Oregon 97209-2534

**DATE RECEIVED BY DAS:** October 27, 2006

**180-DAY DEADLINE:** April 25, 2007

**I. SUMMARY OF CLAIM**

The claimants, Myron Curtis, Carlene Schreiver, Camelia Pierson and Mylo Curtis, seek compensation in the amount of \$7,447,000 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 claimants desire compensation or the right to divide the 20.08-acre subject property<sup>1</sup> into 7,000- to 10,000-square-foot parcels on tax lots 400, 600 and 900 and to develop a dwelling on each resulting parcel, and to develop a retail use with additional signage on tax lots 100, 200, 1000,

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<sup>1</sup> The subject property includes ten tax lots. Tax lot 100 is 1.26 acres, tax lot 200 is 1.06 acres, tax lot 400 is 6.05 acres, tax lot 600 is 0.62 acre, tax lot 900 is 8.73 acres, tax lot 1000 is 0.22 acre, tax lot 2000 is 1.09 acres, tax lot 2100 is 0.04 acre, tax lot 2200 is 0.97 acre and tax lot 2300 is 0.04 acre.

2000, 2100, 2200 and 2300. The subject property is located at 10043, 10125, 10133, 10177 and 10223 SE Powell Boulevard, in the City of Portland, in Multnomah 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 as to Myron Curtis, Carlene Schreiber and Camelia Pierson for the portions of tax lots 400, 600 and 900 in environmental zones. 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 Myron Curtis, Carlene Schreiber, and Camelia Pierson's division of the portions of tax lots 400, 600 and 900 in environmental zones into 7,000- to 10,000-square-foot parcels and to their development of a dwelling on each resulting parcel: 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 these 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 Myron Curtis acquired tax lot 600 on November 19, 1974, and tax lots 400 and 900 on October 7, 1983, and when Carlene Schreiber and Camelia Pierson acquired tax lots 400, 600 and 900 on January 23, 1999. The department acknowledges that the relief to which Carlene Schreiber and Camelia Pierson are entitled under ORS 197.352 will not allow them 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 tax lot 2100 because the claimants have not established that they are owners of that tax lot, and not valid as to tax lots 100, 200, 1000, 2000, 2200 and 2300, and the portions of tax lots 400, 600 and 900 that are not in environmental zones, because the claimants' desired use of that portion of the subject property is not restricted by any state land use regulations.

The department has further determined that the claim is not valid as to Mylo E. Curtis because he is not an owner of the subject property.

(See the complete recommendation in Section VI. of this report.)

## III. COMMENTS ON THE CLAIM

### Comments Received

On March 13, 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 criterion 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 criterion, whichever is later.

### Findings of Fact

This claim was submitted to DAS on October 27, 2006, for processing under OAR 125, division 145. The claim identifies numerous provisions of the City of Portland's code including environmental and sign regulations, and numerous provisions of ORS 92, 197, 215 and 227 and OAR 660 and 661 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 Myron H. Curtis acquired the subject property with his wife, Elizabeth "Betty" L. Curtis, as follows:

Myron and Betty Curtis		
Tax Lot	Acquisition Date	Documentation
100	July 12, 1954 (main portion); October 7, 1983 (30-foot strip)	Land sale contracts and deeds
200	July 12, 1954	Deed
400	October 7, 1983	Land sale contract and deed
600	November 19, 1974	Land sale contract and deed
900	October 7, 1983	Land sale contract and deed
1000	January 13, 1969	Deed
2000	November 29, 1968	Unrecorded unconditional land sale contract and deed
2100	Unknown	No documentation on conveyance
2200	November 28, 1967 (east half); November 18, 1986 (west half)	Land sale contract and deeds
2300	September 2, 1992	Deed

On July 3, 1996, Myron and Betty Curtis each transferred their one-half undivided interest in the subject property to revocable trusts, the Curtis Trust H as to Myron and the Curtis Trust W as to Betty.<sup>2</sup> Upon Betty Curtis' death on January 23, 1999, the Curtis Trust W became irrevocable, and Myron and Betty Curtis' daughters, Carlene Schreiver and Camelia Pierson, acquired the subject property as successor co-trustees of the Curtis Trust W – Residuary Marital Trust. Mylo E. Curtis is an alternate successor co-trustee under the Curtis Trust W and has no present ownership interest in the property in the Curtis Trust W so long as Carlene Schreiver and Camelia Pierson remain co-trustees.

### **Conclusions**

The claimants have not established that they are owners of tax lot 2100.<sup>3</sup> With the exception of tax lot 2100, claimants Myron Curtis, Carlene Schreiver and Camelia Pierson are "owners" of the subject property as that term is defined by ORS 197.352(11)(C). Myron Curtis has been an owner of most of tax lot 100 since July 12, 1954, and the remainder of that tax lot since October 7, 1983; tax lot 200 since July 12, 1954; the east half of tax lot 2200 since November 28, 1967, and the west half since November 18, 1986; tax lot 2000 since November 29, 1968; tax lot 1000 since January 13, 1969; tax lot 600 since November 19, 1974; tax lots 400 and 900 since October 7, 1983; and tax lot 2300 since September 2, 1992. Carlene Schreiver and Camelia Pierson have been owners of all of the subject property except tax lot 2100 since January 23, 1999. Betty Curtis is a "family member" of Carlene Schreiver and Camelia Pierson, as defined by ORS 197.352(11)(A) and acquired the subject property on the same dates as claimant Myron Curtis, as previously explained. Claimant Mylo E. Curtis is not an "owner" of the subject property as that term is defined by ORS 197.352(11)(C). None of the claimants is an owner of tax lot 2100.

### **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' use of private real property in a manner that reduces the fair market value of the

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

<sup>3</sup> On March 13, 2007, DAS sent a letter to the claimants' attorney requesting deeds referenced in the claim but not included in the claim. That documentation has not been received to date.

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 claimants desire to divide the 20.08-acre subject property into 7,000- to 10,000-square-foot parcels on tax lots 400, 600 and 900 and to develop a dwelling on each resulting parcel, and to develop a retail use with additional signage on tax lots 100, 200, 1000, 2000, 2100, 2200 and 2300. The claim also indicates that current land use regulations prohibit the desired use.<sup>4</sup>

The subject property is within the City of Portland and within the Portland metropolitan Urban Growth Boundary (UGB).<sup>5</sup> Tax lots 100, 400, 600 and portions of tax lots 900 and 2000 are currently zoned Residential Single Dwelling 10,000 square feet (R10). Tax lots 400, 600 and 900 are also zoned Environmental Conservation overlay (R10c) and Environmental Protection overlay (R10p). Tax lots 200, 1000 and portions of tax lots 900, 2000, 2200 and 2300 are zoned General Employment (EG2). The remaining portions of tax lots 2200 and 2300 are zoned General Industrial (IG2).

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, portions of tax lots 400, 600 and 900 are subject to the City of Portland's Environmental Conservation and Protection overlay zones as implemented through the Johnson Creek Basin Protection Plan, which has been acknowledged to implement Goal 5.<sup>6</sup> Under Goal 5, as adopted and effective on 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.

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<sup>4</sup> The claimants summarily cited 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 restrict the use of the claimants' property in a manner that reduces its fair market value. This report addresses only those regulations that the department finds are applicable to and restrict the claimants' use of the subject property, based on the claimants' asserted desired use.

<sup>5</sup> Tax lots 100, 200, 400, 600, 900, 1000 and 2000 were annexed into the City of Portland on January 9, 1986. Tax lots 2200 and 2300 were annexed into the City of Portland on June 30, 1989.

<sup>6</sup> The City of Portland's Environmental Conservation and Protection overlay zone was acknowledged by the Commission for compliance with Goal 5 on June 25, 1993.

The Curtis family acquired tax lot 600 on November 19, 1974, after the adoption of Senate Bill 100 (Chapter 80, Oregon Laws 1973) effective on October 5, 1973, but before the adoption of the statewide planning goals, effective on January 25, 1975.

During the period between October 5, 1973, and January 25, 1975, ORS 197.175(1) and 197.280 (1973 editions) required, in addition to any local plan or zoning provisions, that cities and counties exercise their planning responsibilities in accordance with the interim land use planning goals set forth in ORS 215.515 (1973 edition). *Petersen v. Klamath Falls*, 279 Or 249 (1977); *see also, Meeker v. Board of Comm'rs*, 287 Or 665 (1979) (review of a subdivision is an exercise of planning responsibilities requiring application of the goals); *State Housing Council v. Lake Oswego*, 48 Or App. 525 (1981) (noting that while "[l]and use planning responsibility is not defined in ORS ch 197, the Supreme Court has interpreted that term as including annexation approvals, *subdivision approvals* [emphasis added] and partition approvals") citing *Petersen*, *Meeker* and *Alexanderson v. Polk County*, 285 Or 427 (1980). The claimants' desired use includes subdivision of their land. If the Curtis family had sought to create that use in 1974, as a matter of law, the use would have been subject to the interim planning goals at ORS 215.515.<sup>7</sup>

When the Curtis family acquired tax lots 400 and 900 on October 7, 1983, the property was under Multnomah County's jurisdiction and subject to direct application of the provisions of Goal 5 and OAR 660 then in effect.

The claim does not establish whether or the extent to which the claimants' desired development of the portions of tax lots 400, 600 and 900 located in the environmental zones complies with the interim land use goals set forth in ORS 215.515 (1973 edition) in effect when Myron Curtis and the Curtis Family acquired tax lot 600 on November 19, 1974. Nor does it establish whether or the extent to which their development of that portion of the property complied with the provisions of Goal 5 and OAR 660, division 16, in effect when Myron Curtis and the Curtis Family acquired tax lots 400 and 900 on October 7, 1983. The claim also does not establish the extent to which Goal 5 and OAR 660, division 23, restrictions or procedures implemented after the claimants acquired the property restrict the claimants' desired development of the portions of tax lots 400, 600 and 900 in the environmental zones.

## **Conclusions**

The current zoning requirements established by Goal 5 and by OAR 660, divisions 16, and 23, were adopted after Myron Curtis and the Curtis family acquired tax lot 600 in 1974 and tax lots 400 and 900 in 1983, and do not allow the desired development of the property. These

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<sup>7</sup> The "interim" land use goals are set forth in ORS 215.515(1)(a) to (j) (1973 edition) as follows: (a) "To preserve the quality of the air, water and land resources of the state," (b) "To conserve open space and protect natural and scenic resources," (c) "To provide for the recreational needs of citizens of the state and visitors," (d) "To conserve prime farm lands for the production of crops," (e) "To provide for the orderly and efficient transition from rural to urban land use," (f) "To protect life and property in areas subject to floods, landslides and other natural disasters," (g) "To provide and encourage a safe, convenient and economic transportation system including all modes of transportation: Air, water, rail, highway and mass transit and recognizing differences in the social costs in the various modes of transportation," (h) "To develop a timely, orderly and efficient arrangement of public facilities and services to serve as a framework for urban and rural development," (i) "To diversify and improve the economy of the state" and (j) "To ensure that the development of properties within the state is commensurate with the character and the physical limitations of the land." ORS 215.515 (1973 edition).

regulations may restrict the use of portions of tax lots 400, 600 and 900 relative to uses permitted when Myron Curtis and the Curtis family acquired the property. However, the claim does not establish whether or to what extent the claimants' desired use of the subject property complies with the interim planning goals in effect when Myron Curtis and the Curtis family acquired tax lot 600 on November 19, 1974, and the standards for development under Goal 5 and OAR 660, division 16, applicable and in effect when Myron Curtis and the Curtis family acquired tax lots 400 and 900 on October 7, 1983. Nor does the claim establish whether or the extent to which the requirements or procedures of Goal 5 and OAR 660, divisions 16, and 23, adopted after Myron Curtis and the Curtis family acquired the property, restrict the claimants' desired use of the property.

The claim does not establish any state laws that currently restrict the use of the portion of the subject property that is not in an environmental overlay zone. Because the subject property is located within the Portland metropolitan UGB, neither the Commission nor the department enforces laws that require specific zoning on the portion of the property outside of the environmental zones. Based on the record before the department, neither the Commission nor the department enforces any laws that restrict the use of the portion of the claimants' real property that is outside of the environmental overlay zones.

Furthermore, as explained in Section V.(1) above, Mylo Curtis is not an "owner" of any portion of the subject property as that term is defined in ORS 197.352(11)(C), and none of the claimants are "owners" of tax lot 2100 as that term is defined in ORS 197.352(11)(C). Therefore, no laws enforced by the Commission or the department restrict Mylo Curtis' use of the subject property and any of the claimants' use of tax lot 2100 in a manner that reduces 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 \$7,447,000 as the reduction in the subject property's fair market value due to the regulations that restrict the claimant's desired use of the property. This amount is based on the claimants' assessment of the subject property's value.

#### **Conclusions**

As explained in Section V.(1) of this report, the claimants are Myron Curtis, Carlene Schreiber, Camelia Pierson and Mylo Curtis, whose family acquired tax lot 100 in 1954 and 1983, tax lot 200 in 1954, tax lot 2200 in 1967 and 1986, tax lot 600 in 1974, tax lots 400 and 900 in 1983, tax lot 2000 in 1968, tax lot 1000 in 1969 and tax lot 2300 in 1992.

As explained in Section V.(1) of this report, none of the claimants are owners of tax lot 2100, and Mylo Curtis is not an "owner" of any portion of the subject property as that term is defined in ORS 197.352(11)(C). Therefore, no laws restrict Mylo Curtis' use of any portion of the

subject property or the other claimants' use of tax lot 2100 with the effect of reducing the fair market value of the subject property. Further, as set forth in Section V.(2) of this report, the claimants have not established that any state land use laws restrict the use of the portion of the subject property outside of the environmental overlay zones. Accordingly, no laws enforced by the Commission or the department have had the effect of reducing the fair market value of that portion of the subject property.

Under ORS 197.352, Myron Curtis, Carlene Schreiber and Camelia Pierson are due compensation for land use regulations that restrict the use of portions of tax lots 400, 600 and 900 in environmental zones and have the effect of reducing their fair market value. Based on the findings and conclusions in Section V.(2) of this report, laws enacted or adopted since the Curtis family acquired these parcels may restrict Myron Curtis, Carlene Schreiber and Camelia Pierson's desired use of the property. The claimants estimate that the effect of the regulations on the fair market value of all tax lots included in the subject property, and not just tax lots 400, 600 and 900, is a reduction of \$7,447,000.

Without an appraisal or other documentation, and without verification of whether or the extent to which the claimants' desired use of the portions of tax lots 400, 600 and 900 in environmental zones has been restricted by land use regulations enacted or adopted after the Curtis family 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 portions of tax lots 400, 600 and 900 have been reduced to some extent as a result of land use regulations enforced by the Commission or the department.

#### **4. Exemptions Under ORS 197.352(3)**

ORS 197.352 does not apply to certain land use regulations. In addition, under ORS 197.352(3), certain types of laws are exempt from ORS 197.352.

#### **Findings of Fact**

The claim is based on state land use regulations that restrict the use of the subject property, including Goal 5 and OAR 660, divisions 16 and 23, which the City of Portland has implemented through its Environmental Conservation and Protection overlay zones, which cover portions of tax lots 400, 600 and 900. With the exception of amendments adopted after November 19, 1974, for tax lot 600, and October 7, 1983, for tax lots 400 and 900, these land use regulations were in effect when the claimants' family acquired the subject property. None of these regulations restrict the use of the remainder of 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 development of portions of tax lots 400, 600 and 900 are not exempt under ORS 197.352(3)(E) only to the extent they were enacted or adopted after Myron Curtis and the Curtis family acquired tax lot 600 on November 19, 1974,

and tax lots 400 and 900 on October 7, 1983. Provisions of ORS 215.515, including the interim planning goals in effect when Myron Curtis and the Curtis family acquired tax lot 600 in 1974, and provisions of Goal 5 and OAR 660, division 16, in effect when Myron Curtis and the Curtis family acquired tax lots 400 and 900 in 1983 are exempt under ORS 197.352(3)(E) and do not provide a basis for compensation. In addition, laws enacted or adopted for a purpose set forth 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, claimant Mylo Curtis is not an "owner" of any portion of the subject property as that term is defined in ORS 197.352(11)(C), and none of the claimants are owners of tax lot 2100. Therefore, the issue of whether any land use laws are exempt from ORS 197.352 is not relevant to both Mylo Curtis and tax lot 2100.

As set forth in Section V.(2) of this report, the claimants have not established that any state laws restrict the use of the portion of the subject property outside of the environmental zones. Accordingly, the issue of whether any land use laws are exempt from ORS 197.352 is also not relevant to that portion of the property.

## **VI. FORM OF RELIEF**

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

### **Findings of Fact**

Based on the findings and conclusions set forth in this report, laws enforced by the Commission or the department restrict Myron Curtis's, Carlene Schreiber's and Camelia Pierson's desired use of the portions of tax lots 400, 600 and 900 in environmental zones. 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 entire subject property by \$7,447,000. 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 tax lots 400, 600 and 900, 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 they 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 tax lots 400, 600 and 900 to some extent.

Based further on the findings and conclusions set forth in this report, no laws enforced by the Commission or the department restrict Mylo Curtis' use of any of the subject property because he is not an owner of any portion of the property; and do not restrict any of the claimants' use of tax lot 2100 because none of the claimants is an owner of that tax lot. In addition, no laws

enforced by the Commission or the department restrict the claimants' desired use of that portion of the subject property not located within an environmental zone because the claimants have not established that any state land use laws restrict the use of the portion of the subject property outside of the environmental overlay zones.

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 Myron Curtis to use the subject property for a use permitted when he acquired tax lot 600 on November 19, 1974, and tax lots 400 and 900 on October 7, 1983, and to allow Carlene Schreiver and Camelia Pierson to use the subject property for a use permitted when they acquired tax lots 400, 600 and 900 on January 23, 1999.

At the time that Carlene Schreiver and Camelia Pierson acquired tax lots 400, 600 and 900, the subject property was subject to the City of Portland's acknowledged Environmental Conservation and Protection overlay zones implemented to comply with Goal 5 and OAR 660, divisions 16, and 23, currently in effect.

In addition to the applicable provisions of Goal 5 and OAR 660, division 16, and 23, in effect when Carlene Schreiver and Camelia Pierson acquired tax lots 400, 600 and 900 on January 23, 1999, and other laws in effect when any of the claimants acquired the subject property, there may be other laws that apply to the claimants' use of the property that have not been identified in the claim. In some cases, it will not be possible to know which laws apply to a use of the subject property until there is a specific proposal for that use. The department notes that 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 Portland's Environmental Conservation and Protection overlay zone comply with the standards of Goal 5 for public health and safety, those provisions would be exempt under ORS 197.352(3)(B). When the claimants seek a building or development permit to carry out a specific use, it may become evident that other state laws apply to that use, and, depending on when they were enacted or adopted, may continue to apply to the claimants' property. In addition, some of these laws may be exempt under ORS 197.352(3)(A) to (D) and will continue to apply to the subject property on that basis.

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 their claim, the greater the possibility that there may be additional laws that will later be determined to continue to apply to their use of the subject property.

### **Conclusions**

Based on the record before the department, claimants Myron Curtis, Carlene Schreiver and Camelia Pierson 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 for the portion of the subject property that is not in environmental zones. Therefore, the department recommends that this claim be denied as to tax lots 100, 200, 1000, 2000, 2200 and 2300, and the portions of

tax lots 400, 600 and 900 that are not in environmental zones, because the claimants' desired use of those portions is not restricted by any state land use regulations.

The department further recommends that the claim be denied as to tax lot 2100 because the claimants are not owners of that tax lot, and that the claim be denied as to Mylo E. Curtis because he is not an owner of any portion of the subject property.

Based on the record, the department otherwise recommends that the claim be approved for Myron Curtis, Carlene Schreiver and Camelia Pierson, as to those portions of tax lots 400, 600 and 900 within the City of Portland's Environmental Conservation and Protection overlay zones, 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 Myron Curtis's, Carlene Schreiver's and Camelia Pierson's division of the portions of tax lots 400, 600 and 900 in the City of Portland's environmental zones into 7,000- to 10,000-square-foot parcels and to their development of a dwelling on each resulting parcel: applicable provisions and amendments of Goal 5 and OAR 660, divisions 16, and 23, adopted after each claimant acquired the subject property. 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 Myron Curtis acquired tax lot 600 on November 19, 1974, and tax lots 400 and 900 on October 7, 1983, and only to the extent that use was permitted when Carlene Schreiver and Camelia Pierson acquired tax lots 400, 600 and 900 on January 23, 1999. The department acknowledges that the relief to which Carlene Schreiver and Camelia Pierson are entitled under ORS 197.352 will not allow them 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 portions of tax lots 400, 600 and 900 located within an environmental zone for the use described in this report, subject to the standards in effect when Myron Curtis acquired tax lot 600 on November 19, 1974, and tax lots 400 and 900 on October 7, 1983, and when Carlene Schreiver and Camelia Pierson acquired tax lots 400, 600 and 900 on January 23, 1999. On November 19, 1974, tax lot 600 was subject to the applicable provisions of ORS 215 then in effect, including the interim planning goals set forth in ORS 215.515 (1973 edition.) On October 7, 1983, tax lots 400 and 900 were subject to applicable provisions of Goal 5 and OAR 660, division 16, then in effect. On January 23, 1999, tax lots 400, 600 and 900 were subject to applicable provisions of Goal 5 and OAR 660, divisions 16, and 23, 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 subject 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 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 portions of tax lots 400, 600 and 900, 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 claimant from the necessity of obtaining a decision under ORS 197.352 from a local public entity that has jurisdiction to enforce a land use regulation applicable to a use of the subject property by the claimants.

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

The department issued its draft staff report on this claim on April 3, 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.