



# Oregon

Theodore R. Kulongoski, Governor

## Department of Land Conservation and Development

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April 24, 2007

To: Interested Persons

From: Lane Shetterly, Director



*Re: Ballot Measure 37 (ORS 197.352) Claim Number M130517*

*Claimants: Paul and Maria Brown*

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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. M130517  
(BALLOT MEASURE 37) OF )  
Paul and Maria Brown, CLAIMANTS )

Claimants: Paul and Maria Brown (the Claimants)

Property: Township 3S, Range 1W, Section 25, Tax lots 800 and 804,  
Clackamas County (the Property)

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

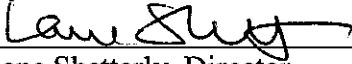
Claimants submitted the Claim to the State of Oregon under ORS 197.352. Under OAR 125-145-0010 *et seq.*, the Department of Administrative Services (DAS) referred the Claim to the Department of Land Conservation and Development (DLCD) as the regulating entity. This order is based on the record herein, 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

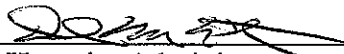
The Claim is denied as to laws administered by DLCD and the Land Conservation and Development Commission (LCDC) for the reasons set forth in the DLCD Report.

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 DLCDC AND THE LAND  
CONSERVATION AND  
DEVELOPMENT COMMISSION:

  
\_\_\_\_\_  
Lane Shetterly, Director  
DLCDC  
Dated this 24<sup>th</sup> day of April, 2007.

FOR THE DEPARTMENT OF  
ADMINISTRATIVE SERVICES:

  
\_\_\_\_\_  
David Hartwig, Administrator  
DAS, State Services Division  
Dated this 24<sup>th</sup> day of April, 2007.

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

You are entitled, or may be entitled, to the following judicial remedies:

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 24, 2007

**STATE CLAIM NUMBER:** M130517

**NAMES OF CLAIMANTS:** Paul and Maria Brown

**MAILING ADDRESS:** 25028 NE Airport Road  
Aurora, Oregon 97002

**PROPERTY IDENTIFICATION:** Township 3S, Range 1W, Section 25  
Tax lots 800 and 804  
Clackamas County

**DATE RECEIVED BY DAS:** October 31, 2006

**180-DAY DEADLINE:** April 29, 2007

**I. SUMMARY OF CLAIM**

The claimants, Paul and Maria Brown, seek compensation in the amount of \$2.7 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 18.1-acre subject property into one additional parcel for residential development.<sup>1</sup> The subject property is located at 25028 NE Airport Road, near Aurora, in Clackamas 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 not valid because Paul and Maria

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<sup>1</sup> Under ORS 197.352(8), if a public entity elects to not apply one or more land use regulations to the claimants' use of the property, it may do so only to allow "a use." Further, in order to determine that land use regulations have restricted the claimants' use of the property, the department must base that determination on a use. The department makes every effort to determine what use of the property the claimants seek to carry out, but in circumstances where the claimants do not provide the information necessary for the department to determine the use sought, the department will conclude that the desired use is to divide each parcel into one additional parcel and to develop a dwelling. On February 20, 2007, Department of Administrative Services sent a letter to the claimants to obtain their desired use. On March 3, 2007, the claimants submitted a letter stating, "I request additional time to comply with your demands." Department staff then attempted to contact the claimants by telephone on March 23, 2007, to obtain their desired use; however, as of the date of this report, no response was received from the claimants. The department is obligated under ORS 197.352 to issue a final decision in every claim made under ORS 197.352 within 180 days of the date the claimants submitted the claim. The department does not have the authority to extend that deadline to allow the claimants additional time to clarify their desired use. If the claimants wish to make a claim for a different use, the claimants may submit a new claim in accordance with the requirements of ORS 197.352.

Brown's division of 7.9-acre tax lot 800 into one additional parcel for residential development was prohibited under the laws in effect when their family member acquired that tax lot 800 in 1998, and not valid as to tax lot 804 because Paul and Maria Brown are not owners of that tax lot. (See the complete recommendation in Section VI. of this report.)

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

#### **Comments Received**

On March 15, 2007, pursuant to Oregon Administrative Rule (OAR) 125-145-0080, the Oregon Department of Administrative Services (DAS) provided written notice to the owners of surrounding properties. According to DAS, three 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
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 31, 2006, for processing under OAR 125, division 145. The claim identifies OAR 660-004-0040(7)(a) and 660-004-0040(8)(e) 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 Paul Brown originally acquired tax lot 804 on December 30, 1961, and acquired tax lot 800 on January 26, 1962, as reflected by warranty deeds included with the claim. On August 17, 1987, Paul Brown conveyed a one-half interest in tax lot 804 to claimant Maria Brown, as reflected by a deed creating an estate by entirety included with the claim. On April 4, 1984, Paul Brown conveyed all of his interest in tax lot 800 to Maria Brown, as reflected by a warranty deed included with the claim. On October 7, 1998, Maria Brown conveyed a one-half interest in tax lot 800 back to Paul Brown, as reflected by a deed creating an estate by entirety included with the claim. On December 7, 1998, the claimants conveyed all of their interest in tax lots 800 and 804 to Brownsville, LLC, a limited liability corporation of which they are owners, as reflected by a quitclaim deed included with the claim. On February 21, 2002, Brownsville, LLC, conveyed tax lot 800 back to the claimants as reflected by a quitclaim deed included with the claim.<sup>2</sup>

The Clackamas County Assessor’s Office confirms the claimants’ ownership of tax lot 800. The claimants do not own tax lot 804.

### **Conclusions**

The claimants, Paul and Maria Brown, are “owners” of tax lot 800 as that term is defined by ORS 197.352(11)(C), as of February 21, 2002. Paul and Maria Brown are not “owners” of tax lot 804 as that term is defined by ORS 197.352 (11)(C). Brownsville, LLC is a “family member” of the claimants, as defined by ORS 197.352(11)(A), as to tax lot 800 and acquired that tax lot on December 7, 1998.

### **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

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<sup>2</sup> Under ORS 197.352(11)(A), legal entities can be “family members” of individuals who are owners of property under ORS 197.352(11)(C). However, legal entities cannot have family members under the statute. Therefore, individuals who transferred property to the LLC are not considered family members under the definition of family member in ORS 197.352(11)(A).

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 18.1-acre subject property into one additional parcel for residential development, and that the desired use is not allowed under current state land use regulations.

The claim is based on the provisions of state law that regulate rural residential zoning. The claimants' property is zoned Rural Residential (RRFF-5) by Clackamas County. The RRFF-5 zone is consistent with Statewide Planning Goal 14 (Urbanization), which generally requires that land outside of urban growth boundaries be used for rural uses. Clackamas County's RRFF-5 zone was adopted on January 12, 1976, and requires a minimum of five acres for the creation of a new lot or parcel.

Goal 14 was effective on January 25, 1975, and requires that local comprehensive plans identify and separate urbanizable land from rural land in order to provide for an orderly and efficient transition from rural to urban land use. In 2000, as a result of a 1986 Oregon Supreme Court decision,<sup>3</sup> the Land Conservation and Development Commission (the Commission) amended Goal 14 and adopted OAR 660-004-0040 (Application of Goal 14 to Rural Residential Areas), which was effective on October 4, 2000.

The rule states that if a county rural residential zone in effect on October 4, 2000, specifies a minimum lot size of two acres or more, the area of any new lot or parcel shall equal or exceed the minimum lot size that is already in effect (OAR 660-004-0040(7)(c)). Some relief from this provision is available for lots or parcels having more than one permanent habitable dwelling pursuant to OAR 660-004-0040(7)(h). The rule also provides that a county's minimum lot size requirement in a rural residential zone shall not be amended to allow a smaller minimum lot size without approval of an exception to Goal 14 (OAR 660-004-0040(6)). Because Clackamas County's rural residential zone was in effect on October 4, 2000, and requires a minimum lot size of five acres, the minimum lot size for any new lot or parcel must equal or exceed five acres.

The claimants' family first acquired tax lot 800 on December 7, 1998. At that time, the property was subject to Clackamas County's acknowledged RRFF-zone currently in effect, and the requirements of Goal 14 implemented through that zone.

### **Conclusions**

The minimum lot size requirements for rural residential lots or parcels established by amendments to Goal 14 and OAR 660-004-0040 were after the claimants' family acquired tax lot 800 in 1998. These land use regulations do not allow the division and residential development on tax lot 800. However, the requirements of Goal 14, as implemented through the county's RRFF-5 zone, prohibited the division of 7.9-acre tax lot 800 into parcels less than five acres when the claimants' family member acquired that tax lot in 1998. State land use laws adopted since the claimants' family acquired tax lot 800 do not restrict the claimants' use of that property

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

relative to uses permitted when their family member acquired it and therefore, do not reduce the property's fair market value.

As explained in Section V.(1) of this report the claimants are not "owners" of tax lot 804 as that term is defined in ORS 197.352(11)(C). Therefore, no laws enforced by the Commission or the department restrict the claimants' use of that tax lot with the effect of reducing its fair market value.

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

In order to establish a valid claim, ORS 197.352(1) requires that the land use regulations (described in Section V.(2) of this report) must have "the effect of reducing the fair market value of the property, or any interest therein."

#### **Findings of Fact**

The claim includes an estimate of \$2.7 million as the reduction in the subject property's fair market value due to the regulations that restrict the claimants' desired use of the property. This amount is based on the claimants' assessment of the subject property's value.

#### **Conclusions**

As explained in Section V.(1) of this report, the claimants are Paul and Maria Brown whose family acquired tax lot 800 on December 7, 1998. As explained in Section V.(1) of this report, the claimants are not "owners" of tax lot 804 and therefore, are not entitled to compensation under ORS 917.352 as to that tax lot. In addition, the claimants' desired division of tax lot 800 was prohibited under the regulations in effect when the claimants' family member acquired tax lot 800 in 1998. No state laws enacted or adopted since the claimants acquired tax lot 800 restrict the use of the property relative to the uses allowed when their family member acquired that tax lot in 1998. Therefore, the fair market value of the subject has not been reduced 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 claimants' desired division of the subject property, including the provisions of Goal 14 and OAR 660-004-0040, which Clackamas County has implemented through its RRFF-5 zone. With the exception of amendments adopted in 2000, these land use regulations were in effect when the claimants' family acquired tax lot 800 in 1998.

## **Conclusions**

With the exception of amendments to Goal 14 and the adoption of OAR 660-004-0040, land use regulations that restrict the claimants' desired use of tax lot 800 were in effect when the claimants' family acquired tax lot 800. These state land use regulations are not exempt under ORS 197.352(3)(E) to the extent they were adopted after the claimants' family acquired the property in 1998. However, laws in effect when the claimants' family acquired tax lot 800 prohibit the claimants' desired division of that tax lot.

As explained in Section V.(1) of this report, the claimants are not "owners" of tax lot 804 as that term is defined in ORS 197.352(11)(C). Therefore, the issue of whether any laws are exempt from ORS 197.352 is not relevant as to tax lot 804.

## **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 do not restrict the claimants' desired use of tax lot 804 because the claimants are not owners of that tax lot; and do not restrict the claimants' desired use of tax lot 800 relative to what was permitted when the claimants' family acquired that tax lot in 1998 because the claimants' desired division of that tax lot was prohibited under the laws in effect when the claimants' family member acquired that tax lot. Therefore, state land use regulations adopted after the claimants' family acquired tax lot 800 do not reduce the fair market value of that tax lot.

## **Conclusions**

Based on the record and the foregoing findings and conclusions, the claimants 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. Therefore, the department recommends that this claim be denied.

## **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.