



# Oregon

Theodore R. Kulongoski, Governor

## Department of Land Conservation and Development

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August 28, 2007

To: Interested Persons  
From: Lane Shetterly, Director



*Re: Ballot Measure 37 (ORS 197.352) Claim Number M131005*

*Claimants: Robert F. Van Bishler II and Carol L. Van Bishler*

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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. M131005  
(BALLOT MEASURE 37) OF )  
Robert F. Van Bishler II and )  
Carol L. Van Bishler, CLAIMANTS )

Claimants: Robert F. Van Bishler II and Carol L. Van Bishler (the Claimants)

Property: Township 2S, Range 3E, Section 7DC, Tax lot 100, Clackamas County  
(the property)

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

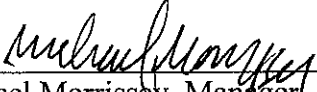
Claimants submitted the Claim to the State of Oregon under ORS 197.352. Under OAR 125-145-0010 *et seq.*, the Department of Administrative Services (DAS) referred the Claim to the Department of Land Conservation and Development (DLCD) as the regulating entity. This order is based on the record herein,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

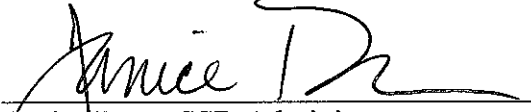
The Claim is denied as to laws administered by DLCD and the Land Conservation and Development Commission (LCDC) for the reasons set forth in the DLCD Report.

This Order is entered by the Manager for the Measure 37 Services Division 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

  
\_\_\_\_\_  
Michael Morrissey, Manager  
DLCD, Measure 37 Services Division  
Dated this 28<sup>th</sup> day of August, 2007.

FOR the DEPARTMENT OF  
ADMINISTRATIVE SERVICES:

  
\_\_\_\_\_  
Janice Dean, SSD Administrator  
DAS, State Services Division  
Dated this 28<sup>th</sup> day of August, 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**

August 28, 2007

**STATE CLAIM NUMBER:** M131005

**NAMES OF CLAIMANTS:** Robert F. Van Bishler II  
Carol L. Van Bishler

**MAILING ADDRESS:** 16030 SE Van Zyl Drive  
Damascus, Oregon 97089

**PROPERTY IDENTIFICATION:** Township 2S, Range 3E, Section 7DC  
Tax lot 100  
Clackamas County

**DATE RECEIVED BY DAS:** November 21, 2006

**DEADLINE FOR FINAL ACTION:<sup>1</sup>** May 14, 2008

**I. SUMMARY OF CLAIM**

The claimants, Robert and Carol Van Bishler, seek compensation in the amount of \$236,000 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 2.66-acre subject property into three parcels and to develop a dwelling on each resulting undeveloped parcel. The property is located at 16030 SE Van Zyl Drive, in Damascus, 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 neither the Land Conservation and Development Commission (the Commission) nor the department has enforced laws that restrict the claimants' use of the subject private real property. (See the complete recommendation in Section VI. of this report.)

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<sup>1</sup> ORS 197.352, as originally enacted, required that final action on claims made under Measure 37 be made within 180 days of the date the claim was filed. In response to the large volume of claims filed in late 2006, the Oregon legislature passed House Bill 3546, which became effective on May 10, 2007. This legislation increased the amount of time state and local governments have to take final action on Measure 37 claims filed on or after November 1, 2006, by 360 days, to a total of 540 days.

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

#### **Comments Received**

On June 12, 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, eight written comments were received in response to the 15-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 November 21, 2006, for processing under OAR 125, division 145. The claim identifies RRF-5 zoning as the basis for the claim. Only laws that were enacted or adopted prior to December 2, 2004, are the basis for this claim.

#### **Conclusions**

The claim has been submitted within two years of the effective date of Measure 37 (December 2, 2004), based on land use regulations enacted or adopted prior to December 2, 2004, and is therefore timely filed.

## V. ANALYSIS OF CLAIM

### **1. Ownership**

ORS 197.352 provides for payment of compensation or relief from specific laws for “owners” as that term is defined in ORS 197.352. ORS 197.352(11)(C) defines “owner” as “the present owner of the property, or any interest therein.”

#### **Findings of Fact**

The claimants, Robert and Carol Van Bishler, acquired the subject property on October 28, 1975, as reflected by a warranty deed included with the claim. The Clackamas County Assessor’s Office confirms the claimants’ current ownership of the subject property.

#### **Conclusions**

The claimants, Robert and Carol Van Bishler, are “owners” of the subject property as that term is defined in ORS 197.352(11)(C), as of October 28, 1975.

### **2. The Laws That are the Basis for This Claim**

In order to establish a valid claim, ORS 197.352(1) requires, in part, that a law must restrict the claimants’ use of private real property in a manner that reduces the fair market value of the property relative to how the property could have been used at the time the claimants or a family member acquired the property.

#### **Findings of Fact**

The claim indicates that the claimants desire to divide the 2.66-acre subject property into three parcels and to develop a dwelling on each resulting undeveloped parcel, and that the property’s current zoning prevents the desired use.

The subject property is currently zoned RRFF-5 by Clackamas County. The RRFF-5 district is a rural residential zone, with a minimum lot size requirement of five acres. However, the subject property is within Damascus city limits and Metro’s Urban Growth Boundary (UGB). 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 UGB, state laws require or encourage a higher intensity of development rather than restrict the use of real property. In this case, the claimants have not alleged how a specific state land use regulation restricts the use of real property and has the effect of reducing the fair market value of that real property.

Based on the information in the claim, the department has not identified any state laws that restrict the claimants’ use of the subject property.

## **Conclusions**

The claim does not establish that any state laws currently restrict the claimants' desired use of their property. Because the subject property is located within the City of Damascus' city limits and Metro's UGB, neither the Commission nor the department enforces laws that require specific zoning of the property. Based on the record before the department, neither the Commission nor the department enforces any laws that restrict the claimants' desired use of the subject 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."

As explained in Section V.(2) of this report, the claimants, Robert and Carol Van Bishler, have not established that any state land use regulations restrict the use of the subject property. Accordingly, the department cannot determine that any laws enforced by the Commission or the department have had the effect of reducing the fair market value of the subject property.

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

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

As explained in Section V.(2) of this report, the claimants, Robert and Carol Van Bishler, have not established that any state land use regulations restrict their desired use of the subject property. Accordingly, the department cannot determine that any exemptions under ORS 197.352(3) apply to this claim.

## **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 record for this claim, the claimants have not established that any state laws enforced by the Commission or the department restrict the use of the subject property, and have the effect of reducing the fair market value of the subject property. Because the subject property is located within the City of Damascus' city limits and Metro's UGB, neither the Commission nor the department enforces laws that require specific zoning of the property.

## **Conclusions**

Based on the record before the department, the claimants, Robert and Carol Van Bishler, have not established that they are entitled to relief under ORS 197.352(1) as a result of land use regulations enforced by the Commission or the department because no state land use regulations restrict the claimants' desired use of the subject property. 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 July 18, 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.