

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

July 18, 2006

**STATE CLAIM NUMBER:** M122465

**NAMES OF CLAIMANTS:** Loren and Charlotte Sawyer

**MAILING ADDRESS:** PO Box 38  
Turner, Oregon 97392

**PROPERTY IDENTIFICATION:** Township 8S, Range 2W, Section 33B  
Tax lot 500

Township 8S, Range 2W, Section 33BA  
Tax lot 2200

Marion County

**OTHER CONTACT INFORMATION:** Norman F. Webb  
1114 12th Street SE  
Salem, Oregon 97302

**DATE RECEIVED BY DAS:** September 23, 2005

**180-DAY DEADLINE:** August 8, 2006<sup>1</sup>

**I. SUMMARY OF CLAIM**

The claimants, Loren and Charlotte Sawyer, seek compensation in the amount of \$78,799 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 combined 54.37-acre subject property (consisting of two tax lots) into one 13.82-acre parcel and one 40.55-acre parcel and to establish a permanent dwelling on the 13.82-acre parcel.<sup>2</sup> The

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<sup>1</sup> This date reflects 180 days from the date the claim was submitted, as extended by the 139 days that all timelines under Measure 37 were suspended during the pendency of *MacPherson v. Dept. of Admin. Svcs.*, 340 Or 117 (2006).

<sup>2</sup> The subject property currently consists of two tax lots. Tax lot 500 includes 50.85 acres. Tax lot 2200 currently includes 3.52 acres and was illegally created from adjoining tax lot 200. In an ORS 197.352 claim for relief before Marion County, the claimants sought to legalize the illegally created tax lot and then through a "lot line adjustment," sought to increase its size to 13.82 acres. In this claim, the claimants seek to "divide" the 3.52-acre parcel from the larger parcel, then increase its size. The state considers the entire subject property, including tax lots 500 and 2200, in this request for relief from state regulations that currently prohibit the division of property into parcels less than 80 acres.

subject property is located at the geographic coordinates listed above in Marion County. (See claim.)

## II. SUMMARY OF STAFF RECOMMENDATION

Based on the preliminary 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 Loren and Charlotte Sawyer's partition of the combined 54.37-acre subject property into one 13.82-acre parcel and one 40.55-acre parcel and to their development of a dwelling on the 13.82-acre parcel: applicable provisions of Statewide Planning Goal 3 (Agricultural Lands), ORS 215 and Oregon Administrative Rules (OAR) 660, division 33, enacted or adopted after they acquired the subject tax lots. These laws 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 they acquired tax lot 500 on April 1, 1977, and when they acquired tax lot 2200 on September 6, 1977. (See the complete recommendation in Section VI of this report.)

## III. COMMENTS ON THE CLAIM

### Comments Received

On October 11, 2005, 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.

One of the comments 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.

The second comment is relevant to whether the restriction of the claimants' use of the subject property reduces the fair market value of the property and whether a state agency may waive state law. The comments have been considered by the department in preparing this report. (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 September 23, 2005, for processing under OAR 125, division 145. The claim identifies the provisions of Marion County's Exclusive Farm Use (EFU) zone 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 subject property consists of two tax lots. This claimants, Loren and Charlotte Sawyer, acquired tax lot 500, consisting of 50.85 acres, on April 1, 1977, as reflected in a land sales contract included with the claim. The claimants acquired tax lot 2200, consisting of 3.52 acres, on September 6, 1977, from Loren Sawyer's parents, Vincent and Helen Sawyer, as reflected by a deed of record cited in the Marion County staff report for the claimants' ORS 197.352 claim for relief before the county. Vincent and Helen Sawyer acquired tax lot 2200 as part of a larger unit of land, tax lot 200 (Township 8S, Range 2W, Section 33B), on December 1, 1964, also as reflected by a deed of record cited in the Marion County staff report. The Marion County Assessor's Office confirms the claimants' current ownership of the subject tax lots.

### **Conclusions**

The claimants, Loren and Charlotte Sawyer, are "owners" of tax lots 500 and 2200 as that term is defined by ORS 197.352(11)(C). They have been owners of tax lot 500 since April 1, 1977, and owners of tax lot 2200 since September 6, 1977. The claimants' parents, Vincent and Helen Sawyer, are "family members," as defined by ORS 197.352(11)(A), as to tax lot 2200 and acquired the property that includes tax lot 2200 on December 1, 1964.

## **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 acquired the property.

### **Findings of Fact**

The claim indicates that Marion County's EFU zone does not allow the claimant's desired use of the subject property.

The claim is based generally on Marion County's current EFU zone and the applicable provisions of state law that require such zoning. The claimants' property is zoned EFU as required by Goal 3, in accordance with ORS 215 and OAR 660, division 33, because the claimants' property is "agricultural land" as defined by Goal 3.<sup>3</sup> Goal 3 became effective on January 25, 1975, and required that agricultural lands as defined by the Goal be zoned EFU pursuant to ORS 215.

Current land use regulations, particularly ORS 215.263, 215.284 and 215.780 and OAR 660, division 33, enacted or adopted pursuant to Goal 3, prohibit the division of EFU-zoned land into parcels less than 80 acres and establish standards for the development of dwellings on existing or proposed parcels on that land.

ORS 215.780 establishes an 80-acre minimum size for the creation of new lots or parcels in EFU zones and became effective on November 4, 1993 (Chapter 792, Oregon Laws 1993). ORS 215.263 (2005 edition) establishes standards for the creation of new parcels for non-farm uses and dwellings allowed in an EFU zone.

OAR 660-033-0135 (applicable to farm dwellings) became effective on March 1, 1994, and interprets the statutory standard for a primary dwelling in an EFU zone under ORS 215.283(1)(f). OAR 660-033-0130(4) (applicable to non-farm dwellings) became effective on August 7, 1993, and was amended to comply with ORS 215.284(4) on March 1, 1994. The Commission subsequently adopted amendments to comply with House Bill 3326 (Chapter 704, Oregon Laws 2001, effective on January 1, 2002), which were effective on May 22, 2002. (See administrative rule history for OAR 660-033-0100, -0130 and -0135.)

The existing mobile home on the subject property was approved by Marion County in 1977 with the condition that it be removed at a specified time. The Marion County staff report (included in the department's file) indicates the dwelling was not removed as required so a replacement dwelling, pursuant to ORS 215.283(1)(s) and the corresponding county ordinance provision, is not permitted.

The claimants' family acquired tax lot 2200 in 1964, prior to the adoption of the statewide planning goals and their implementing statutes and regulations. No county zoning applied to the

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<sup>3</sup> The claimants' property is "agricultural land" because it contains Natural Resources Conservation Service Class I-IV soils.

subject property in 1964. The claimants acquired tax lot 500 on April 1, 1977, after the adoption of the statewide planning goals, but before the Commission acknowledged Marion County's land use regulations to be in compliance with the statewide planning goals pursuant to ORS 197.250 and 197.251. Tax lot 500 was zoned EFU by Marion County when the claimants acquired the property. (Also see Section VI, Form of Relief.)

### **Conclusions**

The current zoning requirements, minimum lot size and dwelling standards established by applicable provisions of Goal 3, ORS 215 and OAR 660, division 33, were all enacted or adopted after the claimants' family acquired tax lot 2200. These laws restrict the use of tax lot 200 relative to the uses allowed when the claimants' family acquired it.

The current zoning requirements, minimum lot size and dwelling standards established by applicable provisions of Goal 3, ORS 215 and OAR 660, division 33, do not allow the claimants' desired division or development of tax lot 500. However, the claim does not establish whether or the extent to which the claimants' desired use of tax lot 500 complies with the standards for land divisions and development under the requirements of Goal 3 and ORS 215 in effect when the claimants acquired it on April 1, 1977.

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

In order to establish a valid claim, ORS 197.352(1) requires that any land use regulation 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 \$78,799 as the reduction in the subject property's fair market value due to current regulations. This amount is based on an appraisal report that compares the sales value of the property with and without a new replacement home on it.

### **Conclusions**

As explained in Section V.(1) of this report, the claimants are Loren and Charlotte Sawyer whose family acquired tax lot 2200 on December 1, 1964, and who acquired tax lot 500 on April 1, 1977. Under ORS 197.352, the claimants are due compensation for land use regulations that restrict the use of the subject property and have the effect of reducing its fair market value. Based on the findings and conclusions in Section V.(2) of this report, laws enacted or adopted since the claimants' family acquired the subject property restrict the claimants' desired use of the property. The claimants estimate that the effect of the regulations(s) on the fair market value of the subject property is a reduction of \$78,799.

Without additional documentation and without verification of whether or the extent to which the claimants' desired use of the subject property was allowed under the standards in effect when the claimants and their 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 property. Nevertheless, based on the evidence in the record for this claim, the department

determines that the fair market value of the subject property has been reduced to some extent as a result of land use regulations enforced by the Commission or the department.

#### **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 relative to the uses permitted when the claimants' family acquired tax lot 2200 and when the claimants acquired tax lot 500, including applicable provisions of Goal 3, ORS 215 and OAR 660, division 33, which Marion County has implemented through its current EFU zone. With the exception of provisions of Goal 3 and ORS 215 in effect when the claimants acquired the tax lot 500 on April 1, 1977, these land use regulations were enacted or adopted after the claimants and their family acquired the 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 97.352. It appears that, with the exception of provisions of Goal 3 and ORS 215 in effect when the claimants acquired tax lot 500, the general statutory, goal and rule restrictions on residential division and development of the subject property were not in effect when the claimants' family acquired tax lot 2200 on December 1, 1964, and when the claimants acquired tax lot 500 on April 1, 1977. As a result, with the exception of those laws in effect when the claimants acquired tax lot 500, these laws are not exempt under ORS 197.352(3)(E). Laws in effect when the claimants' family acquired tax lot 2200 and when the claimants acquired tax lot 500 are exempt under ORS 197.352(3)(E), and do not provide a basis for compensation. In addition, other land use laws enacted or adopted for a purpose set forth in ORS 197.352(3)(A) to (D) are also exempt and would not provide a basis for compensation.

### **VI. FORM OF RELIEF**

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

## Findings of Fact

Based on the findings and conclusions set forth in this report, laws enforced by the Commission or the department restrict the claimants' desired use of the subject property. The claim asserts that existing state land use regulations enforced by the Commission or the department have the effect of reducing the fair market value of the subject property by \$78,799. However, without additional relevant evidence demonstrating that the land use regulations described in Section V.(2) reduce the fair market value of the subject property, a specific amount of compensation cannot be determined. In order to determine a specific amount of compensation due for this claim, it would also be necessary to verify whether or the extent to which the claimants' desired use of the subject property was allowed under the standards in effect when the claimants and their family acquired the property. Nevertheless, based on the record for this claim, the department has determined that the laws on which the claim is based have reduced the fair market value of the subject property to some extent.

No funds have been appropriated at this time for the payment of claims. In lieu of payment of compensation, ORS 197.352 authorizes the department to modify, remove or not apply all or parts of certain land use regulations to allow Loren and Charlotte Sawyer to use the subject property for a use permitted at the time they acquired tax lot 500 on April 1, 1977, and tax lot 2200 on September 6, 1977.

The claimants acquired both tax lots 500 and 2200 after the adoption of the statewide planning goals, but before the Commission acknowledged Marion County's land use regulations to be in compliance with the statewide planning goals pursuant to ORS 197.250 and 197.251. Because the Commission had not acknowledged the county's plan and land use regulations when the claimants acquired the subject property on April 1 and September 6, 1977, the statewide planning goals, and Goal 3 in particular, applied directly to the claimants' property when they acquired it.<sup>4</sup>

As adopted on January 25, 1975, Goal 3 required that agricultural land be preserved and zoned for EFU pursuant to ORS 215. The Goal 3 standard for land divisions involving property where the local zoning was not acknowledged required that the resulting parcels must be of a size that is "appropriate for the continuation of the existing commercial agricultural enterprise within the area." Further, ORS 215.263 (1973 edition) only authorized the partition of land subject to EFU zoning, and required that all divisions of land subject to EFU zoning comply with the legislative intent set forth in ORS 215.243 (Agricultural Land Use Policy). Thus, the claimants' opportunity to divide the subject property when they acquired it in 1977 was limited to land

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<sup>4</sup> The statewide planning goals became effective on January 25, 1975, and were applicable to legislative land use decisions and some quasi-judicial land use decisions prior to the Commission's acknowledgment of each county's comprehensive plan and implementing regulations. *Perkins v. City of Rajneeshpuram*, 300 Or 1 (1985); *Alexanderson v. Polk County*, 289 Or 427, rev. den 290 Or 137 (1980); *Sunnyside Neighborhood Assn. v. Clackamas County*, 280 Or 3 (1977); *Jurgenson v. Union County*, 42 Or App 505 (1979); and *1000 Friends of Oregon v. Benton County*, 32 Or App 413 (1978). After the county's plan and land use regulations were acknowledged by the Commission, the statewide planning goals and implementing rules no longer applied directly to such local land use decisions. *Byrd v. Stringer*, 295 Or 311 (1983). However, statutory requirements continue to apply, and insofar as the state and local provisions are materially the same, the local provisions must be interpreted consistent with the substance of the goals and implementing rules. *Forster v. Polk County*, 115 Or App 475 (1992) and *Kenagy v. Benton County*, 115 Or App 131 (1992).

divisions that were consistent with Goal 3, which required that the resulting parcels be (1) appropriate for the continuation of the existing commercial agricultural enterprise in the area and (2) shown to comply with the legislative intent set forth in ORS 215.

Under the Goal 3 standards in effect in 1977, farm dwellings were allowed if they were determined to be "customarily provided in conjunction with farm use" under ORS 215.213(1)(e) (1975 edition). Non-farm dwellings were subject to compliance with ORS 215.213(3) (1975 edition).

No information has been presented in the claim to establish that the claimants' desired property division complies with the "commercial" standard for farm parcels under Goal 3 or the standards for non-farm parcels under ORS 215.263 (1975 edition), nor is there any information to establish that the claimants' desired development of a dwelling on the subject property satisfies the standards for farm or non-farm dwellings under ORS 215.213 (1975 edition).

In addition to the applicable provisions of Goal 3 and ORS 215 in effect when 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. 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 use that the claimants have identified. Similarly, this report only addresses the exemptions provided for under ORS 197.352(3) that are clearly applicable given the information provided to the department in the claim. The claimants should be aware that the less information they have provided to the department in 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, 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 Loren and Charlotte Sawyer's partition of the combined 54.37-acre subject property into one 13.82-acre parcel and one 40.55-acre parcel and to their development of a dwelling on the 13.82-acre parcel: applicable provisions of Goal 3, ORS 215 and OAR 660, division 33, enacted or adopted after they acquired the subject tax lots. 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 they acquired tax lot 500 on April 1, 1977, and when they acquired tax lot 2200 on September 6, 1977.

2. The action by the State of Oregon provides the state's authorization to the claimants to use the property for the use described in this report, subject to the standards in effect on April 1, 1977, for tax lot 500 and September 6, 1977, for tax lot 2200. On these dates, the property was subject to applicable provisions of Goal 3 and ORS 215 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 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 by the claimants 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 the subject property, 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 claimants 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. NOTICE OF OPPORTUNITY TO COMMENT**

This staff report is not a final decision by the department and does not authorize any use of the property that is the subject of this report. OAR 125-145-0100 provides 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. Such response must be filed no more than 10 calendar days after the date this report is mailed to the claimants and any third parties. Responses to this draft staff report and recommendation will be considered only as comments related to the claim described in this report. All responses must be delivered to the Oregon Department of Administrative Services (DAS), Measure 37 Unit, Risk Management-State Services Division, 1225 Ferry Street SE, U160, Salem, Oregon 97301-4292 and will be deemed timely filed if either postmarked on the tenth day, or actually delivered to DAS by the close of business on the tenth day. Note: Please reference the claim number, claimant name and clearly mark your comments as "Draft Staff Report comments." Comments must be submitted in writing only. Those comments submitted electronically or by facsimile will not be accepted.

