

**ORS 197.352 (BALLOT MEASURE 37) CLAIM FOR COMPENSATION**

**OREGON DEPARTMENT OF LAND CONSERVATION AND DEVELOPMENT  
Draft Staff Report and Recommendation**

July 25, 2006

**STATE CLAIM NUMBER:** M122585

**NAME OF CLAIMANT:** William G. Richards

**MAILING ADDRESS:** 29415 SE Powell Valley Road  
Gresham, Oregon 97080

**PROPERTY IDENTIFICATION:** Township 01S, Range 04E, Section 19  
Tax lot 200  
Multnomah County

**OTHER CONTACT INFORMATION:** Mark P. O'Donnell, Esq.  
1650 NW Naito Parkway  
Fremont Place II, Suite 302  
Portland, Oregon 97209

**DATE RECEIVED BY DAS:** September 30, 2005

**180-DAY DEADLINE:** August 15, 2006<sup>1</sup>

**I. SUMMARY OF CLAIM**

The claimant, William Richards, seeks compensation in the amount of \$915,000 for the reduction in fair market value as a result of land use regulations that are alleged to restrict the use of certain private real property. The claimant desires compensation or the right to divide the 19.99-acre property into 20 parcels of 20,000 to 40,000 square feet and to develop a dwelling on each parcel. The subject property is located at 29415 SE Powell Valley Road, near Gresham, in Multnomah 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 William Richards' partition of the 19.99-acre property into 20

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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).

parcels of 20,000 to 40,000 square feet or to his development of a dwelling on each parcel: applicable provisions of Statewide Planning Goals 3 (Agricultural Lands) and 14 (Urbanization), ORS 215 and Oregon Administrative Rules (OAR) 660, division 33, enacted or adopted after June 13, 1978. These laws will not apply to the claimant only to the extent necessary to allow him to use the subject property for the use described in this report, and only to the extent that use was permitted when he acquired the property on June 13, 1978. The department acknowledges that the relief to which the claimant is entitled under ORS 197.352 may not allow the claimant to use the subject property to the extent desired by the claimant, as described in this report. (See the complete recommendation in Section VI of this report.)

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

#### **Comments Received**

On May 17, 2006, 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, evidence or information 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 September 30, 2005, for processing under OAR 125, division 145. The claim identifies numerous Multnomah County Zoning and Subdivision and

Partition Ordinances and ORS 92, 197, 215, 227 and 454 as the basis for the claim.<sup>2</sup> Only laws that were enacted or adopted prior to December 2, 2004, are the basis for this claim.

### **Conclusions**

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

## **V. ANALYSIS OF CLAIM**

### **1. Ownership**

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

### **Findings of Fact**

The claimant, William Richards, acquired the subject property from his parents, Eugene and Dean Richards, on June 13, 1978, as reflected by a bargain and sale deed included with the claim.<sup>3</sup> There is some information in the record for this claim to indicate that William Richards may have transferred ownership to his mother, Mrs. Dean Richards, at some later time (the department’s files include a bargain and sale deed from Mrs. Dean Richards to the Dean Richards Trust for property including the subject property on December 27, 1994). However, the Multnomah County Assessor’s Office confirms the claimant’s current ownership of the subject property. The department is continuing to investigate whether William Richards transferred the subject property at some date after 1978.

### **Conclusions**

Based on the evidence currently in the record, the department concludes that the claimant, William Richards, is an “owner” of the subject property as that term is defined by ORS 197.352(11)(C), and that he became an owner on June 13, 1978. The department is continuing its investigation to confirm that William Richards is the current owner of the property, and if so, when he became the owner. Eugene and Dean Richards are “family members” of William Richards, as defined by ORS 197.352(11)(A), and acquired the subject property on August 31, 1944.

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<sup>2</sup> This report addresses only those laws administered by the department. A separate report concerning the statutes in ORS 454, identified in the claim, is being prepared by the Oregon Department of Environmental Quality. This report also is not intended to affect in any way the application of any local ordinance or other local law to the claimant’s use of the subject property.

<sup>3</sup> The claim includes a statement asserting that William Richards acquired a leasehold interest in the subject property in January or February 1973. No written agreement has been provided establishing the existence of a lease of tax lot 200, and the claim also includes information that this lease is to the William Richards Construction Co. rather than to William Richards. As a result, on the basis of the current record for this claim, the department concludes that William Richards first acquired an ownership interest in the subject property as of 1978.

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

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

### **Findings of Fact**

The claim indicates that the claimant desire to divide the 19.99-acre property into 20 parcels of 20,000 to 40,000 square feet and to develop a dwelling on each parcel and lists numerous state land use regulations as restricting the desired use.<sup>4</sup>

The claim is based generally applicable provisions of state law that require Exclusive Farm Use (EFU) zoning. The claimant's property is zoned EFU as required by Goal 3, in accordance with ORS 215 and OAR 660, division 33, because the claimant's property is "agricultural land" as defined by Goal 3.<sup>5</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.)

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<sup>4</sup> The claim lists certain statutes in ORS 92, 197, 215 and 227, statewide planning goals 1 to 14 and certain Commission rules as restricting the use of the property but does not establish how each of these regulations applies to and restricts the claimant's desired use of the subject property in a manner that reduces the property's fair market value. On their face, except for the laws addressed in this report, the regulations listed in the claim either do not apply to the subject property or do not restrict the claimant's desired use of the subject property. In the absence of any explanation by the claimant as to how these regulations restrict the use of the subject property in a manner that reduces the property's fair market value, this report addresses only those regulations that the department finds are applicable to and restrict the claimant's use of the subject property, based on the claimant's asserted desired use.

<sup>5</sup> The claimant's property is "agricultural land" because it contains Natural Resources Conservation Service Class I-IV soils.

The claimant's family first acquired the subject property in 1944, prior to the adoption of the statewide planning goals and their implementing statutes and rules.

Goal 14 would likely apply to the division of the claimant's property into parcels of 20,000 to 40,000 square feet and to the development of a dwelling on each parcel because those are "urban" uses of land, and the property is located outside of an acknowledged urban growth boundary. Goal 14 generally requires that land outside urban growth boundaries be used for rural uses. Goal 14 became effective on January 25, 1975, after the claimant's family acquired the subject property, but before the claimant acquired the property.

### **Conclusions**

The current zoning requirements, minimum lot size and dwelling standards established by Goals 3 and 14, ORS 215 and OAR 660, division 33, were all enacted or adopted after the claimant's family acquired the subject property. These laws restrict the use of the subject property relative to the uses allowed when the claimant's family acquired 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 regulation(s) (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 \$915,000 as the reduction in the subject property's fair market value due to the regulation(s). This amount is based on the claimant's comparison and interpretation of limited review appraisals and comparable sales of 20,000 square feet to one-acre properties in the surrounding county.

### **Conclusions**

As explained in Section V.(1) of this report, the claimant is William Richards whose family acquired the subject property in 1944. Under ORS 197.352, the claimant is 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 claimant's family acquired the subject property restrict the claimant's desired use of the property. The claimant estimates that the effect of the regulations(s) on the fair market value of the subject property is a reduction of \$915,000.

Without an appraisal or other documentation, it is not possible to substantiate the specific dollar amount by which the land use regulations have reduced the fair market value of the subject property. Nevertheless, based on the evidence in the record for this claim, the department determines that the fair market value of the subject property has been reduced to some extent as a result of land use regulations enforced by the Commission or the department since the claimant's family acquired the 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.

#### **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 claimant's family acquired the property, including applicable provisions of Goals 3 and 14, ORS 215 and OAR 660, division 33. All of these land use regulations were enacted or adopted after the claimant's family acquired the subject property.

#### **Conclusions**

It appears that none of the general statutory, goal and rule restrictions on residential division and development of the subject property were in effect when the claimant's family acquired property on August 31, 1944. As a result, these laws are not exempt under ORS 197.352(3)(E). Laws in effect when the claimant's family acquired the subject property 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 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 the claimant's desired use of the subject property. The claim asserts that existing land use regulations enforced by the Commission or the department have the effect of reducing the fair market value of the subject property by \$915,000. 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 a fair market of the subject property, a specific amount of compensation cannot be determined. In order to determine a specific amount of compensation due for this claim, it would also be necessary to verify whether or the extent to which the claimant's desired use of the subject property was allowed under the standards in effect when his 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 William Richards to use the subject property for a use permitted at the time he acquired the property on June 13, 1978.

The claimant acquired the subject property on June 13, 1978, after the adoption of the statewide planning goals, but before the Commission acknowledged Multnomah County's land use regulations to be in compliance with the statewide planning goals pursuant to ORS 197.250 and 197.251. At that time, the subject property was zoned Multiple Use Agriculture (MUA-20) by Multnomah County, which established a 20-acre minimum lot size for new division and development. Because the Commission had not acknowledged the county's plan and land use regulations when the claimant acquired the subject property on June 13, 1978, the statewide planning goals, and Goals 3 and 14 in particular, applied directly to the claimant's desired use of the property when he acquired it, along with the county's ordinances.<sup>6</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 claimant's opportunity to divide the subject property when he acquired it in 1978 was limited to land 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. In addition, under Goal 14, the claimant would need to establish that his proposed use of the subject property is not "urban," as that term is used in Goal 14.

Under the Goal 3 standards in effect on June 13, 1978, farm dwellings were allowed if they were determined to be "customarily provided in conjunction with farm use" under ORS 215.213(1)(e) (1973 edition). Non-farm dwellings were subject to compliance with ORS 215.213(3) (1973 edition).

No information has been presented in the claim to establish that the claimant's desired division of the subject property into 20 parcels complies with the "commercial" standard for farm parcels under Goal 3 or the standards for non-farm parcels under ORS 215.263 (1973 edition), nor is

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<sup>6</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).

there any information to establish that the claimant's desired development of 20 dwellings on the subject property satisfies the standards for farm or non-farm dwellings under ORS 215.213 (1973 edition) or Goal 14.

This report addresses only those state laws that are identified in the claim, or that the department is certain apply to the subject property based on the uses that the claimant has identified. Similarly, this report only addresses the exemptions provided for under ORS 197.352(3) that are clearly applicable, given the information provided to the department in the claim. The claimant should be aware that the less information he has provided to the department in the claim, the greater the possibility that there may be additional laws that will later be determined to continue to apply to his use of the subject property.

### **Conclusions**

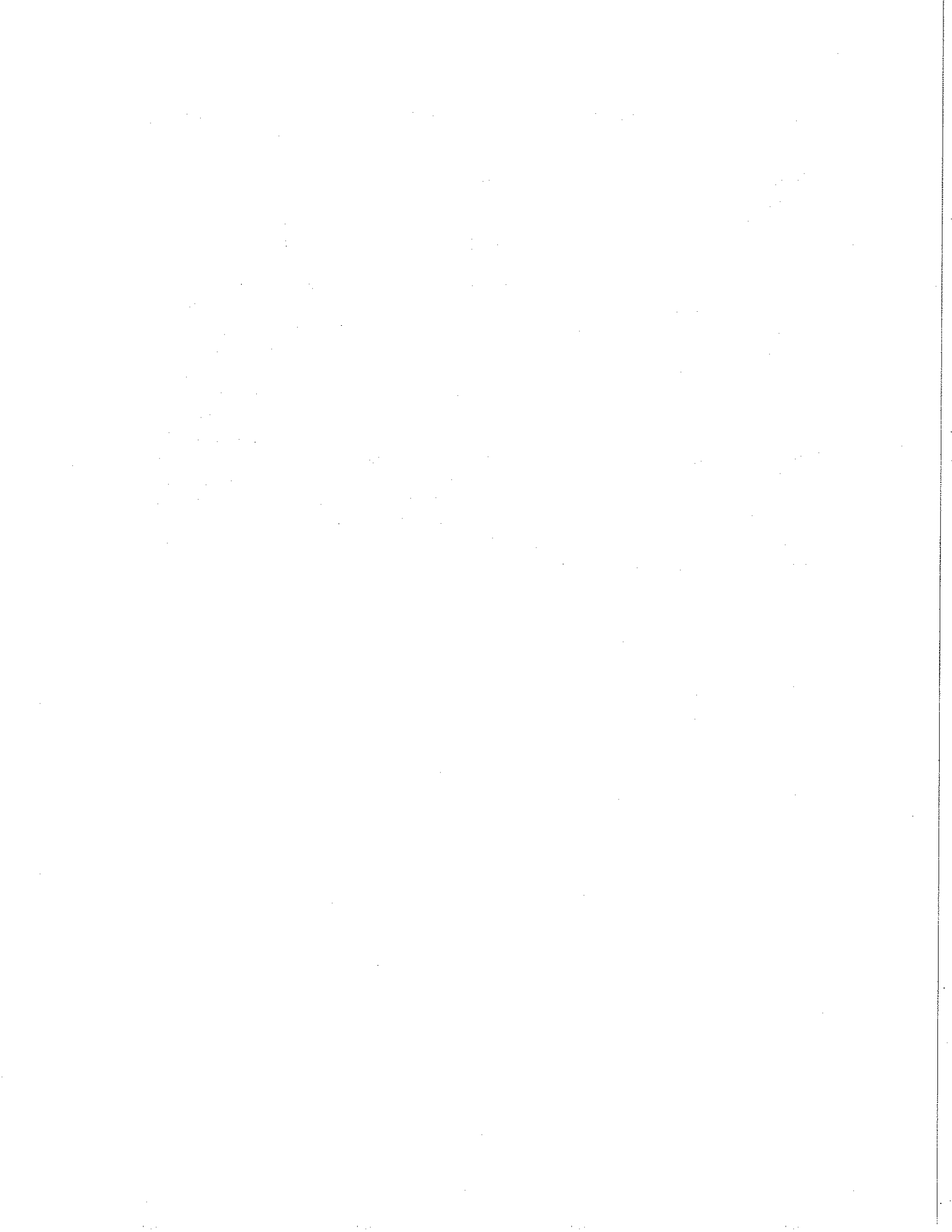
Based on the record, the department recommends that the claim be approved, subject to the following terms:

1. In lieu of compensation under ORS 197.352, the State of Oregon will not apply the following laws to William Richards' partition of the 19.99-acre property into 20 parcels of 20,000 to 40,000 square feet or to his development of a dwelling on each parcel: applicable provisions of Goals 3 and 14, ORS 215 and OAR 660, division 33, enacted or adopted after June 13, 1978. These land use regulations will not apply to the claimant only to the extent necessary to allow him to use the subject property for the use described in this report, and only to the extent that use was permitted when he acquired the property on June 13, 1978. The department acknowledges that the relief to which the claimant is entitled under ORS 197.352 may not allow the claimant to use the subject property to the extent desired by the claimant, as described in this report.
2. The action by the State of Oregon provides the state's authorization to the claimant to use the property for the use described in this report, subject to the standards in effect on June 13, 1978. On that date, the property was subject to applicable provisions of Goals 3 and 14 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 claimant first obtains that permit, license or other form of authorization or consent. Such requirements may include, but are not limited to: a building permit, a land use decision, a "permit" as defined in ORS 215.402 or 227.160, other permits or authorizations from local, state or federal agencies and restrictions on the use of the subject property imposed by private parties.
4. Any use of the subject property by the claimant under the terms of the order will remain subject to the following laws: (a) those laws not specified in (1) above; (b) any laws enacted or enforced by a public entity other than the Commission or the department; and (c) those laws not subject to ORS 197.352 including, without limitation, those laws exempted under ORS 197.352(3).
5. Without limiting the generality of the foregoing terms and conditions, in order for the claimant to use the subject property, it may be necessary for him to obtain a decision under ORS

197.352 from a city and/or county and/or metropolitan service district that enforces land use regulations applicable to the property. Nothing in this order relieves the claimant from the necessity of obtaining a decision under ORS 197.352 from a local public entity that has jurisdiction to enforce a land use regulation applicable to a use of the subject property by the claimant.

## **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 claimant or the claimant's authorized agent and any third parties who submitted comments under OAR 125-145-0080 to submit written comments, evidence and information in response to the draft staff report and recommendation. Such response must be filed no more than 10 calendar days after the date this report is mailed to the claimant 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.



**ORS 197.352 (BALLOT MEASURE 37) CLAIM FOR COMPENSATION**

**OREGON DEPARTMENT OF ENVIRONMENTAL QUALITY  
Draft Staff Report and Recommendation**

July 25, 2006

**STATE CLAIM NUMBER:** M122585

**NAMES OF CLAIMANTS:** William G. Richards<sup>1</sup>

**MAILING ADDRESS:** 29415 SE Powell Valley Rd.  
Gresham, Oregon 97080

**PROPERTY IDENTIFICATION:** Township 1S, Range 4E, Section 19AB  
Tax lot 200  
Multnomah County

**OTHER CONTACT INFORMATION:** Mark P. O'Donnell, Esq. and  
Kristian Roggendorf, Esq.  
1650 NW Naito Parkway  
Portland, Oregon 97209

**DATE RECEIVED BY DAS:** September 30, 2005

**180-DAY DEADLINE:** August 15, 2006<sup>2</sup>

**I. SUMMARY OF CLAIM**

See Department of Land Conservation and Development (DLCD) Staff Report.

**II. SUMMARY OF STAFF RECOMMENDATION**

Based on the preliminary findings and conclusions set forth below, the Department of Environmental Quality (the department) has determined that the claim is not valid as to laws administered by the department. The rules listed in the claim pertaining to the department or the Environmental Quality Commission (Commission) are not "land use

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<sup>1</sup> The claim is in the name of Mrs. Dean A. Richards. However William G. Richards has signed the claim on behalf of William Richards Construction Co., and the claim includes information about William Richards' possible interest in the subject property. This is dealt with in Section V.1. of this report.

<sup>2</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).

regulations," have not been enforced as to this property, and are likely exempt under ORS 197.352(3). (See the complete recommendation in Section VI. of this report.)

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

See DLCD staff report.

### **IV. TIMELINESS OF CLAIM**

See DLCD staff report.

### **V. ANALYSIS OF CLAIM**

#### **1. Ownership**

The findings of the Draft Staff Report of the Department of Land Conservation and Development on this claim regarding ownership are incorporated into this report by this reference.

#### **2. The Laws that Are the Basis for the Claim**

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

#### **Findings of Fact**

The claimants wish to divide the 19.99 acre subject property into 20 parcels of between 20,000 and 40,000 square feet, and to develop a dwelling on each parcel. The claim lists numerous statutes and rules administered by the department and Commission, but contains no explanation of why or how these laws restrict the claimants' use of the property or have reduced the value of the property. Nothing in the rules or statutes listed restrict the division of land into residential lots as proposed by claimants. The claim states that the property is suitable for septic systems on parcels of the size proposed. As a result, the department determines that the laws listed in the claim do not restrict the claimant's desired use of the property.

In addition, nothing in the claim indicates that the listed statutes or rule administered by the department have been enforced with respect to claimant's desired use of the property. The claimant has not sought approval of septic systems for the desired residential dwellings. As a result, the department has not enforced the listed laws with respect to the claimant's desired use of this property, and there is therefore no basis for providing relief under ORS 197.352.

