

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

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

July 28, 2006

**STATE CLAIM NUMBER:** M122664

**NAMES OF CLAIMANTS:** Ivan O. McDowell  
Timothy W. McDowell

**MAILING ADDRESS:** 13715 S. Carus Road  
Oregon City, Oregon 97045

**PROPERTY IDENTIFICATION:** Township 3S, Range 2E, Section 29D  
Tax lot 2100  
Clackamas County

**DATE RECEIVED BY DAS:** October 5, 2005

**180-DAY DEADLINE:** August 20, 2006<sup>1</sup>

**I. SUMMARY OF CLAIM**

The claimants, Ivan and Timothy McDowell, seek compensation in the amount of \$225,261 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 2.98-acre property into three 1-acre parcels for residential development. The subject property is located at 13715 South Carus Road, near Oregon City, in Clackamas 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 the claimants' division of the 2.98-acre property into three 1-acre parcels for residential development: applicable provisions of Statewide Planning Goal 14 (Urbanization) and Oregon Administrative Rule (OAR) 660-004-0040, adopted after each of the claimants acquired the subject property. These land use regulations will not apply to the claimants only to the extent necessary to allow them to use the subject property for the use described in this report, and only to the extent that use was permitted when Ivan McDowell

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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).

acquired the property on June 6, 1972, and when Timothy McDowell acquired the property on April 2, 1999. The department acknowledges that, to the extent the claimants desire to divide the property into parcels less than two acres in size, the relief to which Timothy McDowell is entitled under ORS 197.352 will not permit him to use the property for the desired use. (See the complete recommendation in Section VI. of this report.)

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

#### **Comments Received**

On May 26, 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, no written comments were received in response to the 10-day notice.

### **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 5, 2005, for processing under OAR 125, division 145. The claim identifies Clackamas County's RRF-5 zoning and OAR 660-004-0040(7)(a) 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 Ivan McDowell acquired the subject property on June 6, 1972, as reflected by a contract included with the claim. Claimant Timothy McDowell acquired the subject property on April 2, 1999, as reflected by a bargain and sale deed included with the claim.<sup>2</sup> The Clackamas County Assessor’s Office confirms the claimants’ current ownership of the subject property.

### Conclusions

The claimants, Ivan and Timothy McDowell, are “owners” of the subject property as that term is defined by ORS 197.352(11)(C), as of June 6, 1972, and April 2, 1999, respectively. Ivan McDowell is a “family member” of Timothy McDowell as that term is defined by ORS 197.352(11)(A).

### 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 2.98-acre subject property into three 1-acre parcels for residential development, which is not allowed under current land use regulations.

The claim is based generally on the applicable provisions of state law that require rural residential zoning. The subject property is zoned by Clackamas County as RRF-5, a rural residential zone consistent with Goal 14, which generally requires that land outside of urban growth boundaries be used for rural uses.

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 general, Goal 14 prohibits the division of land for rural residential use into lots or parcels of less than two acres in size.

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<sup>2</sup> Through this deed, Ivan McDowell conveyed his interest to himself and Timothy McDowell “not as tenants in common but with the right of survivorship.”

In 2000, as a result of a 1986 Oregon Supreme Court decision,<sup>3</sup> 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.

Claimant Ivan McDowell acquired the subject property in 1972, prior to the adoption of the statewide planning goals and their implementing statutes and rules. At that time, it was zoned Rural Residential (RA-1) by the county, which allowed lots or parcels one acre or larger.

### **Conclusions**

The minimum lot size requirements for rural residential lots or parcels established by Goal 14 and OAR 660-004-0040 were adopted since Ivan McDowell acquired the subject property in 1972 and do not allow the desired division of the property.

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. There may be other laws that currently apply to the claimants' use of the subject property, and that may continue to apply to their 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 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.

### **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 \$225,261 as the reduction in the subject property's fair market value due to the regulations that restrict the claimants' desired use of the property. The claimants assert that this amount is based on "Clackamas County Planning."

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

## **Conclusions**

As explained in Section V.(1) of this report, the claimants are Ivan McDowell who acquired the subject property on June 6, 1972, and his family member, Timothy McDowell. 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 Ivan McDowell 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 \$225,261.

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 Ivan McDowell 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, including Goal 14 and OAR 660-004-0040, which Clackamas County has implemented through its RRFF-5 zone. These land use regulations were adopted after Ivan McDowell acquired the subject property.

### **Conclusions**

Without a specific development proposal for the subject property, it is not possible for the department to determine all the laws that may apply to a particular use of the property, or whether those laws may fall under one or more of the exemptions under ORS 197.352. It appears that none of the general goal and rule restrictions on division of rural residential land were in effect when Ivan McDowell acquired the subject property in 1972. As a result, these laws are not exempt under ORS 197.352(3)(E).

Laws in effect when Ivan McDowell acquired the subject property are exempt under ORS 197.352(3)(E) and will continue to apply to the claimants' use of the property. There may be other laws that continue to apply to the claimants' use of the subject 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. In some cases, some of these laws may be exempt under ORS 197.352(3)(A) to (D).

## 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 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 \$225,261. However, because the claim does not provide an appraisal or other relevant evidence demonstrating that the land use regulations described in Section V.(2) reduce the fair market value of 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 Ivan McDowell 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 Ivan McDowell to use the subject property for a use permitted at the time he acquired the property on June 6, 1972, and to allow Timothy McDowell to use the property for a use permitted at the time he acquired the property on April 2, 1999.

As described previously, Ivan McDowell acquired the subject property prior to the adoption of the statewide planning goals and their implementing statutes and rules. When Timothy McDowell acquired the subject property on April 2, 1999, it was subject to Clackamas County's acknowledged rural residential zone and the applicable provisions of Goal 14 then in effect. As stated previously, Goal 14 generally prohibits the division of land for rural residential use into lots or parcels of less than two acres in size.

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 the claimants' division of the 2.98-acre property into three 1-acre parcels for residential development: applicable provisions of Goal 14 and OAR 660-004-0040, adopted after each of the claimants acquired the subject property. These land use regulations will not apply to the claimants only to the extent necessary to allow them to use the subject property for the use described in this report, and only to the extent that use was permitted when Ivan McDowell acquired the property on June 6, 1972, and after Timothy McDowell acquired the property on April 2, 1999. The department acknowledges that, to the extent the claimants desire to divide the property into parcels less than two acres in size, the relief to which Timothy McDowell is entitled under ORS 197.352 will not permit him to use the property for the desired use.
2. The action by the State of Oregon provides the state's authorization to Ivan McDowell to use the subject property for the use described in this report, subject to the standards in effect on June 6, 1972, and to Timothy McDowell to use the property for the use described in this report, subject to the standards in effect on April 2, 1999. On April 2, 1999, the property was subject to Clackamas County's acknowledged rural residential zone and the provisions of Goal 14 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.