

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. M118492  
(BALLOT MEASURE 37) OF )  
William C. Case, Trustee, CLAIMANT )

Claimant: William C. Case, Trustee (the Claimant)

Property: Tax lot 701, Township 10S, Range 3W, Section 8, Linn County (the Property)

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

Claimant 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 approved as to laws administered by DLCD and the Land Conservation and Development Commission (LCDC) for the reasons set forth in the DLCD Report, and 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 C. Case's division of the 62.96-acre property into three parcels or to the establishment of a single-family dwelling on each parcel created: applicable provisions of Statewide Planning Goal 3, ORS 215, and OAR 660 division 33, enacted after February 20, 1976. These land use regulations will not apply to the claimant's use of his property only to the extent necessary to allow the claimant a use permitted at the time he acquired the property on February 20, 1976. The department acknowledges that the relief to which the claimant is entitled under ORS 197.352 may not allow the claimant to use the property in the manner set forth in the claim.
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 February 20, 1976. On that date, the property was subject to Statewide Planning Goal 3 (1975 edition) and applicable provisions of 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 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 ORS 227.160, other permits or authorizations from local, state or federal agencies, and restrictions on the use of the property imposed by private parties.

4. Any use of the property by the claimant under the terms of the order will remain subject to the following laws: (a) those laws not specified in Condition 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 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 property by the claimant.

This Order is entered by the Director of the DLCD as a final order of DLCD and the Land Conservation and Development Commission under ORS 197.352, OAR 660-002-0010(8), and OAR 125, division 145, and by the Deputy Administrator for the State Services Division of the DAS as a final order of DAS under ORS 197.352, OAR 125, division 145, and ORS 293.

FOR DLCD AND THE LAND CONSERVATION  
AND DEVELOPMENT COMMISSION:

  
\_\_\_\_\_  
Lane Shetterly, Director  
DLCD  
Dated this 31<sup>st</sup> day of March, 2006.

FOR the DEPARTMENT OF ADMINISTRATIVE  
SERVICES:

  
\_\_\_\_\_  
Dugan Petty, Deputy Administrator  
DAS, State Services Division  
Dated this 3<sup>rd</sup> day of March, 2006.

## NOTICE OF RIGHT TO APPEAL OR OTHER JUDICIAL RELIEF

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

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<sup>1</sup>, 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)

### FOR INFORMATION ONLY

The Oregon Department of Justice has advised the Department of Land Conservation and Development that "[i]f the current owner of the real property conveys the property before the new use allowed by the public entity is established, then the entitlement to relief will be lost."

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<sup>1</sup> By order of the Marion County Circuit Court, "all time lines under Measure 37 [were] suspended indefinitely" on October 25, 2005. This suspension was lifted on March 13, 2006 by the court. As a result, a period of 139 days (the number of days the time lines were suspended) has been added to the 180-day time period under ORS 197.352(6) for claims that were pending with the state on October 25, 2005.

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

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

March 31, 2006

**STATE CLAIM NUMBER:** M118492

**NAMES OF CLAIMANT:** William C. Case, Trustee

**MAILING ADDRESS:** 33010 Dever-Conner Road N.E.  
Albany, Oregon 97321

**PROPERTY IDENTIFICATION:** Township 10S, Range 3W, Section 8  
Tax lot 701  
Linn County

**OTHER CONTACT INFORMATION:** George Heilig  
582 N.W. Van Buren Street  
P.O. Box 546  
Corvallis, Oregon 97339

**OTHER INTEREST IN PROPERTY:** Mervin C. and Violet C. Case  
Revocable Trust  
33010 Dever-Conner Road N.E.  
Albany, Oregon 97321

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

**180-DAY DEADLINE:** April 7, 2006<sup>1</sup>

**I. SUMMARY OF CLAIM**

The claimant, William C. Case, Trustee of the Mervin C. and Violet C. Case Revocable Trust, seeks compensation in the amount of \$179,870 for the reduction in fair market value as a result of certain 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 62.96-acre property into three parcels and to develop a residential dwelling on each parcel. The property is located at 33070 Dever-Conner Road N.E., near Albany, in Linn County. (See claim.)

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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 enforcement of Ballot Measure 37 was suspended during the pendency of the appeal of *MacPherson v. Dep't of Admin. Servs.*, 340 Or \_\_\_, 2006 Ore. LEXIS 104 (February 21, 2006).

## **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 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 Mr. Case's division of the property into three parcels for residential development: applicable provisions of Statewide Planning Goal 3, ORS 215 and applicable provisions of OAR 660 division 33 enacted after February 20, 1976. These laws will not apply to the claimant only to the extent necessary to allow Mr. Case to use the property for the use described in this report, to the extent that use was permitted at the time he acquired an interest in the property in 1976. The department acknowledges that the relief to which the claimant is entitled under ORS 197.352 (Ballot Measure 37) may not allow the claimant to use the property in the manner set forth in the claim. (See the complete recommendation in Section VI of this report.)

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

### **Comments Received**

On June 20, 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, one written comment was received in response to the 10-day notice. The comment is relevant to whether the restriction of the claimant's use of the property reduces the fair market value of the property. The comment has been considered by the department in preparing this report. (See the comment letter 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 Ballot 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 criterion 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 Ballot 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 criterion, whichever is later.

### **Findings of Fact**

This claim was submitted to DAS on May 23, 2005 for processing under OAR 125, division 145. The claim identifies provisions of ORS 215 and OAR 660 as laws that restrict the use of the

property as the basis for the claim. Only laws that were enacted prior to December 2, 2004, the effective date of Ballot Measure 37, are the basis for this claim. (See citations of statutory and administrative rule history of the Oregon Revised Statutes and Oregon Administrative Rules.)

### **Conclusions**

The claim has been submitted within two years of December 2, 2004; the effective date of Ballot Measure 37, based on land use regulations 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**

Mervin C. and Violet C. Case (parents of the claimant, William C. Case) acquired the subject property on January 18, 1936. Mervin C. and Violet C. Case transferred the subject property to the Mervin C. and Violet C. Case Revocable Trust in 1976, as reflected by Bargain and Sale Deeds included with the claim.<sup>2</sup> The claimant, William C. Case, Trustee, acquired an interest in the subject property on February 20, 1976, as a Trustee of the Revocable Trust. Information provided by the Linn County Assessor’s office indicates that William C. Case is the current owner of the subject property as of October 3, 2005.

### **Conclusions**

The claimant, William C. Case, Trustee, is an “owner” of the subject property, as that term is defined by ORS 197.352(11)(C), as of February 20, 1976. The property was first acquired by the Case family on January 18, 1936.

### **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 or a family member acquired the property.

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<sup>2</sup> Mervin C. and Violet C. Case are not identified as claimants in the claim submittal.

## **Findings of Fact**

The claim identifies provisions of ORS 215 and OAR 660 as laws and rules that restrict the use of the subject property. The claimant desires to divide the 62.96-acre property into three parcels, and to develop each parcel with a residential dwelling, which he asserts, he could have done when he acquired the property.<sup>3</sup>

The claim is based, in part, on Linn County's current Exclusive Farm Use (EFU) zone and the applicable provisions of state law that require such zoning. The claimant's property is zoned EFU as required by Goal 3, in accord with OAR 660 division 33 and ORS 215 because the claimant's property is "Agricultural Land" as defined by Goal 3.<sup>4</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, 215.780 and OAR 660, division 33 as applied by Goal 3, do not allow the subject property to be divided into parcels less than 80 acres and establish standards for allowing the existing or any proposed parcels to have farm or non-farm dwellings on them.

ORS 215.780 established an 80-acre minimum size for the creation of new lots or parcels in EFU zones and became effective 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. Subsequent amendments to comply with HB 3326 (Chapter 704, Oregon Laws 2001, and effective January 1, 2002,) were adopted by the Commission effective May 22, 2002. (See citations of administrative rule history for OAR 660-033-0100, 0130 and 0135.)

The claimant's family acquired the property on January 18, 1936, prior to the establishment of the statewide land use planning goals and their implementing statutes and regulations. At that time, the property was not zoned by the county.

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<sup>3</sup> The claim acknowledges that the property is presently developed with two single-family dwellings, constructed in 1900 and 1957, and one manufactured home approved by Linn County in 1990, "for farm help from a relative."

<sup>4</sup> The claimant's property is "Agricultural Land" because it contains Natural Resources Conservation Service (NRCS) Class I-IV soils.

## **Conclusions**

The zoning requirements, minimum lot size and dwelling standards established by Statewide Planning Goal 3 (Agricultural Lands) and provisions applicable to land zoned EFU in ORS 215 and OAR 660 division 33 adopted since the claimant's family acquired the property in 1936, do not allow the division of the property into parcels smaller than 80 acres and limit the claimant's ability to establish dwellings on the property relative to what may have been possible in 1936.

This report addresses only those state laws that are identified in the claim, or that the department is certain apply to the property based on the uses that the claimant has identified. There may be other laws that currently apply to the claimant's use of the property, and that may continue to apply to the claimant's use of the property, that have not been identified in the claim. In some cases, it will not be possible to know what laws apply to a use of property until there is a specific proposal for that use. When the claimant seeks 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 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 \$179,870 as the reduction in the property's fair market value, as a result of current regulations. This amount is based on a real estate broker's estimate of the market value of three parcels for three homes sites (\$663,160), less the current market value of the property (\$483,290).

### **Conclusions**

As explained in Section V.(1) of this report, the current owner's family acquired the property on January 18, 1936. Under ORS 197.352, William C. Case is due compensation for land use regulations that restrict the use of the subject property in a manner that reduces its fair market value. Based on the findings and conclusions in Section V.(2) of this report, laws adopted since the claimant's family acquired the property restrict division of the subject property. The claimant estimates the reduction in value due to the restrictions to be \$179,870.

Based on the documentation submitted with the claim, it is not possible to substantiate the specific dollar amount the claimant demands for compensation. Nevertheless, based on the submitted information, the department determines that it is more likely than not that there has been some reduction in the fair market value of the subject property 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 identifies state laws that restrict the use of the subject property relative to what would have been allowed in 1936, when the property was acquired by William C. Case's family. These laws include Goal 3 and applicable provisions of ORS 215 and OAR 660, division 33. These laws are not exempt under ORS 197.352(3)(E), which exempts laws in effect when the claimant's family acquired the property.

#### **Conclusions**

Without a specific development proposal for the property, it is not possible for the department to determine what laws 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 does appear that the general statutory, goal and rule restrictions on residential development and use of farm land apply to the claimant's use of the property, and for the most part these laws are not exempt under ORS 197.352(3)(E).

Laws in effect when the claimant's family acquired the property are exempt under ORS 197.352(3)(E), and will continue to apply to the claimant's use of the property. There may be other laws that continue to apply to the claimant's use of the property that have not been identified in the claim. In some cases, it will not be possible to know what laws apply to a use of property until there is a specific proposal for that use. When the claimant seeks a building or development permit to carry out a specific use, it may become evident that other state laws apply to that use. And, in some cases, some of these laws may be exempt under ORS 197.352(3)(A) to (D).

This report addresses only those state laws that are identified in the claim, or that the department is certain apply to the 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 his 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 property.

### **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 a law that restricts 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 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 division of the subject property into three parcels, and the development of a dwelling on each parcel. The claim asserts that the laws enforced by the Commission or department reduce the fair market value of the subject property by \$197,870. Based on the documentation submitted in the claim, a specific amount of compensation cannot be determined. Nevertheless, based on the record for this claim, the department acknowledges that the laws on which the claim is based likely have reduced the fair market value of the 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 C. Case to use the subject property for a use permitted at the time he acquired the property on February 20, 1976.

William C. Case acquired the property on February 20, 1976, when it was zoned EFU by Linn County. The County's EFU zone at that time, required a 40-acre minimum parcel size for the creation of new residential lots or parcels. However, the County's EFU zone that applied to the property at that time was not acknowledged by the Commission under the standards for state approval of local comprehensive plans and land use regulations pursuant to ORS 197.250 and 197.251.<sup>5</sup> Since the Commission had not acknowledged Linn County's comprehensive plan and land use regulations (including the EFU zone) when William C. Case acquired the property on February 20, 1976, Statewide Planning Goal 3 applied directly to property on the date of acquisition.<sup>6</sup>

In 1976, the state standard for a land division involving "Agricultural Land" where the local zoning was not acknowledged was that the resulting parcels must be of a size that is "appropriate for the continuation of the existing commercial agricultural enterprise in the area" (Statewide

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<sup>5</sup> The Commission acknowledged the Linn County Comprehensive Plan and land use regulations as complying with the Statewide Planning Goals on June 20, 1985.

<sup>6</sup> Statewide Planning Goal 3 became effective on January 25, 1975, and was applicable to legislative land use decisions and some quasi-judicial land use decisions where site specific goal provisions applied prior to the Commission's acknowledgment of the County's Goal 3 program in 1985 (*Sunnyside Neighborhood Assn. v. Clackamas County*, 280 Or 3 (1977), *1000 Friends of Oregon v. Benton County*, 32 Or App 413 (1978), *Jurgenson v. Union County*, 42 Or App 505 (1979), *Alexanderson v. Polk County*, 289 Or 427, rev den 290 Or 137 (1980) and *Perkins v. City of Rajneeshpuram*, 300 Or 1 (1985)). After the County's plan and land use regulations were acknowledged by the Commission, the Statewide Planning Goals and implementing rules no longer directly applied 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 in substance, the applicable rules must be interpreted and applied by the county in making its decision. *Forster v. Polk County*, 115 Or App 475 (1992) and *Kenagy v. Benton County*, 115 Or App 131 (1992).

Planning Goal 3). In 1976, the state standard for the construction of dwellings on "Agricultural Land" in Goal 3 was that the use not significantly or adversely affect, accepted farm or forest practices.

No information has been provided showing that the claimant's request for division of his 62.96-acre property into three parcels with dwellings would comply with either the Goal 3 standard for parcel size for farm parcels, or with the Goal 3 standard in 1976, for farm and non-farm uses of agricultural land (1975 Edition). Based on the applicability of Goal 3 and the Linn County EFU zone in effect in 1976, which required a 40-acre minimum parcel size, it is not clear how the claimant's desired use of the property could have been approved when he acquired an interest in the property, in 1976.

### **Conclusion**

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 C. Case's division of the 62.96-acre property into three parcels or to the establishment of a single-family dwelling on each parcel created: applicable provisions of Statewide Planning Goal 3, ORS 215, and OAR 660 division 33, enacted after February 20, 1976. These land use regulations will not apply to the claimant's use of his property only to the extent necessary to allow the claimant a use permitted at the time he acquired the property on February 20, 1976. The department acknowledges that the relief to which the claimant is entitled under ORS 197.352 may not allow the claimant to use the property in the manner set forth in the claim.
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 February 20, 1976. On that date, the property was subject to Statewide Planning Goal 3 (1975 edition) and applicable provisions of 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 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 ORS 227.160, other permits or authorizations from local, state or federal agencies, and restrictions on the use of the property imposed by private parties.
4. Any use of the property by the claimant under the terms of the order will remain subject to the following laws: (a) those laws not specified in Condition 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 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 property by the claimant.

#### **VII. COMMENTS ON THE DRAFT STAFF REPORT**

The department issued its draft staff report on this claim on March 13, 2006. OAR 125-145-0100(3), provided 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. Comments received have been taken into account by the department in the issuance of this final report.