

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. M118404
(BALLOT MEASURE 37) OF	)	
Cherry Crest Farms, Inc, CLAIMANT	)	

Claimant: Cherry Crest Farms, Inc (the Claimant)

Property: Tax lots 100, 4700, Township 3S, Range 40, Section 14, Union 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 Cherry Crest Farms, Inc.'s division of the property in approximately 10-acre parcels and development of a residential dwelling on each parcel: applicable provisions of Statewide Planning Goals 3 and 4, ORS 215, and OAR 660, division 6, enacted after October 7, 1975. These land use regulations will not apply to Cherry Crest Farms, Inc.'s use of its property for the use described in this report, and only to the extent necessary to allow the claimant a use permitted at the time it acquired the property on October 7, 1975.
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 October 7, 1975. On that date, the property was subject to applicable provisions of Goals 3 and 4 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 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 (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 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 17th day of March, 2006.

FOR the DEPARTMENT OF ADMINISTRATIVE  
SERVICES:



Dugan Petty, Deputy Administrator  
DAS, State Services Division

Dated this 17th day of March, 2006.

## **NOTICE OF RIGHT TO APPEAL OR OTHER JUDICIAL RELIEF**

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

1. Judicial review under ORS 293.316: Judicial review under ORS 293.316 may be obtained by filing a petition for review within 60 days from the service of this order. Judicial review under ORS 293.316 is pursuant to the provisions of ORS 183.482 to the Court of Appeals.
2. 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 and the Circuit Court in the county in which you reside.
3. A cause of action under ORS 197.352: A present owner of the property, or any interest therein, may file a cause of action in the Circuit Court for the county where the property is located, if a land use regulation continues to apply to the subject property more than 180 days after the present owner made a written demand for compensation.

(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.”

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

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

March 17, 2006

**STATE CLAIM NUMBER:** M118404

**NAME OF CLAIMANT:** Cherry Crest Farms, Inc

**MAILING ADDRESS:** 69800 Haefer Lane  
Cove, Oregon 97824

**PROPERTY IDENTIFICATION:** Township 3S, Range 40, Section 14  
Tax lots 100, 4700  
Union County

**OTHER CONTACT INFORMATION:** Ronald Puckett  
69800 Haefer Lane  
Cove, Oregon 97824

**DATE RECEIVED BY DAS:** May 9, 2005

**180-DAY DEADLINE:** March 24, 2006<sup>1</sup>

**I. SUMMARY OF CLAIM**

The claimant, Cherry Crest Farms, Inc., seeks compensation in the amount of \$680,000 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 235.94-acre property into approximately 10-acre lots and to develop a dwelling on each lot. The property is located at 69800 Haefer Lane, near Cove, in Union County. (See claim.)

**II. SUMMARY OF STAFF RECOMMENDATION**

Based on the findings and conclusions set forth below, the Department of Land Conservation and Development (the department) has determined that the claim is 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 Cherry Crest Farms, Inc.'s division of the property for residential development: Statewide Planning Goal 3 (Agricultural Lands) and Goal 4 (Forest Lands), ORS 215 and

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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 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).

applicable provisions of OAR 660 division 6 enacted after October 7, 1975. These laws will not apply to the claimant only to the extent necessary to allow Cherry Crest Farms, Inc. to use of the property for the use described in this report, and only to the extent that use was permitted at the time it acquired it in 1975. (See the complete recommendation in Section VI. of this report.)

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

#### **Comments Received**

On June 1, 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, three written comments, evidence or information were received in response to the 10-day notice.<sup>2</sup>

The comments do not address whether the claim meets the criteria for relief (compensation or waiver) under ORS 197.352. Comments concerning the effects a use of the property may have on surrounding areas generally are 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 waiving a state law. (See 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 the Measure (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 the Measure (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 May 9, 2005, for processing under OAR 125, division 145. The claim indirectly identifies the Union County minimum lot size as the law that restricts 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 Measure 37, are the basis for this claim. (See citations

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<sup>2</sup> The 10-day notice period was suspended for 139 days during the pendency of the *Macpherson v. Dep't of Admin. Servs.*, 340 Or \_\_\_, 2006 Ore. LEXIS 104 (February 21, 2006), which suspended all Measure 37 deadlines.

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 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**

The claimant, Cherry Crest Farms, Inc., acquired the subject property on October 7, 1975, as reflected by a title report included with the claim. The title report dated December 13, 2004, indicates that Cherry Crest Farms, Inc. is the current owner of the subject property.

### **Conclusions**

The claimant, Cherry Crest Farms, Inc., is an “owner” of the subject property, as that term is defined by ORS 197.352(11)(C), as of October 7, 1975.

### **2. The Laws that are the Basis for this Claim**

In order to establish a valid claim, ORS 197.352(1) requires, in part, that a law must restrict the 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 claim is based on Union County’s A4 zone, which allows for Timber Grazing and sets a minimum parcel size of 240 acres. Union County’s A4 zone is a mixed farm-forest zone, adopted to comply with Statewide Planning Goal 4 (Forest Lands), and the implementing provisions of OAR 660-006-0050 (effective February 5, 1990,) and subsequently amended on March 1, 1994 to comply with the provisions of HB 3661 (Chapter 792, Oregon Laws 1993).

Under OAR 660-006-0050, all the uses permitted under Statewide Goals 3 and 4 are allowed except that for dwellings, either the Goal 3 or 4 standards are applicable based on the predominant use of the tract on January 1, 1993. Depending on the predominant use on

January 1, 1993, the property will be subject to either the requirements for dwellings under exclusive farm use zoning required by Statewide Planning Goal 3 and OAR 660, division 33, or forest zone provisions required by Statewide Planning Goal 4 and OAR 660, division 006. This includes the dwelling standards asserted by the claimant as restricting the use of the property. However, no analysis of whether any of the tax lots can be approved for a dwelling under the applicable farm or forest provisions has been provided.

For land divisions, OAR 660-006-0055 authorizes the creation of new parcels based on the standards applicable to farm or forest zones which implements the 80-acre minimum lot size specified in ORS 215.780. The claimant's property is 235.94 acres and is currently developed with one dwelling. Under OAR 660-006-055, the claimant's property cannot be divided into parcels smaller than 80 acres as may have been possible under the County zone applied in October 1975. However, no analysis of whether any of the tax lots can be divided for non-farm dwellings under ORS 215.263(5)(b) has been provided.

When the claimants acquired the property in 1975, it was zoned A-2 (Mixed Farm Forest, ten-acre minimum parcel size), which may have allowed it to divide the property into approximately 10-acre parcels and develop additional residential dwellings on these new parcels. However, at that time the County's A-2 zoning had not been acknowledged for compliance with the Statewide Planning Goals. Accordingly, when the claimant acquired the property in 1975, the Statewide Planning Goals, and in particular Goal 4 (Forest Lands) applied directly to the property.<sup>3</sup> In general, Goal 4 required local land use regulations to "conserve forest land for forest uses." Specifically, Goal 4 only allowed land divisions that would protect commercial forest lands for commercial forest uses. Dwelling in forest zones can only be allowed if found to be "necessary and accessory" to one of the enumerated forest uses defined in Goal 4. No information provided in the claim demonstrates that claimant's proposed use is consistent with the provisions of Goal 4 in effect when the property was acquired in 1975.

### **Conclusions**

The zoning requirements, minimum lot size and dwelling standards established by Statewide Planning Goal 4 (Forest Lands) and provisions applicable to land zoned for forest in ORS 215 and OAR 660, division 6, were all enacted after Cherry Crest Farms, Inc. acquired ownership of the subject property in October 7, 1975, and do not allow the division of the property into 10 acre parcels. In 1975, the property was subject to the requirements of Goal 4 then in effect.

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<sup>3</sup> Statewide Planning Goal 4 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 plan and implementing regulations. (*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 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).

However, the claim does not establish, and it is not clear whether or to what extent the claimants' requested level of development would have been permitted at the time the claimants acquired the property.

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 a 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 \$680,000 as the reduction in the subject property's fair market value due to current regulations. This amount is based on the claimant's estimate of market value.

#### **Conclusions**

As explained in Section V.(1) of this report, the current owner is Cherry Crest Farms, Inc. who acquired the property on October 7, 1975. Under ORS 197.352, Cherry Crest Farms, Inc. 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 acquired the property restrict division of the subject property. The claimant estimates the reduction in value due to the restrictions to be \$680,000.

Without an appraisal or other documentation and, without verification of whether or the extent to which the claimant's use of the subject property was allowed under the standards in effect when it acquired the property, 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 is more likely than not that the fair market value of the subject property has been reduced to some extent as a result of land use regulations entered 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 includes a general reference to any state land use regulations that restrict the use of the property relative to what would have been allowed in 1975, when the property was acquired by Cherry Crest Farms, Inc. These provisions include Statewide Planning Goal 3 (Agricultural Lands) and Goal 4 (Forest Lands) and applicable provisions of ORS 215 and OAR 660, division 6, which Union County has implemented through its A4 timber grazing zone. These laws are not exempt under ORS 197.352(3)(E), to the extent they were enacted or adopted after the claimant acquired the property. Provisions of Goals 3 and 4, and ORS 215 adopted before October 7, 1975, are exempt under ORS 197.352(3)(E), which exempts laws in effect when the claimant 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 mixed farm and forest land apply to the claimant's use of the property, and these laws are not exempt under ORS 197.352(3)(E) to the extent they were enacted or adopted after the claimant acquired the property. Provisions of Goals 3 and 4, and ORS 215 in effect when the claimant acquired the property in 1975 are exempt under ORS 197.352(3)(E) and will continue to apply to the property.

Other laws in effect when the claimant acquired the property are also exempt under ORS 197.352(3)(E), and will continue to apply to the claimant's use of the property. In addition, the siting standards for dwellings in forest zones under ORS 215.730 and in Goal 4 and its implementing rules, OAR 660, division 6, are exempt under ORS 197.352(3)(B). 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). For example, the siting standards for forest dwellings for public health and safety are exempt under Section 3(B) of ORS 197.352.

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 it has provided to the department in its claim, the greater the possibility that there may be additional laws that will later be determined to continue to apply to its 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 claimant's ability to divide the property into approximately 10-acre parcels and develop a residential dwelling on each parcel.

The claim asserts that the laws enforced by the Commission or the department restrict the claimant's ability to divide the 235.94-acre property into approximately 10-acre parcels and to develop a dwelling on each parcel. The claim asserts that the laws enforced by the Commission or the department reduce the fair market value of the subject property by \$680,000. However, because the claim does not provide an appraisal or other specific documentation establishing how the specified restrictions reduce the fair market value of the subject property, and without verification of whether or not the extent to which the claimant's desire use of the property was allowed under the standards in effect when the claimant acquired the property, 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 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 Cherry Crest Farms, Inc. to use the subject property for a use permitted at the time it acquired the property on October 7, 1975.

### **Conclusion**

Based on the record, the department recommends that the claim be approved, subject to claimants providing an estimate of the reduction in the fair market value of the property due to land use restrictions enacted after October 7, 1975, that restrict the claimant's ability to divide the subject property into 10-acre parcels and develop a residential dwelling on each parcel, 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 Cherry Crest Farms, Inc.'s division of the property in approximately 10-acre parcels and development of a residential dwelling on each parcel: applicable provisions of Statewide Planning Goals 3 and 4, ORS 215, and OAR 660, division 6, enacted after October 7, 1975. These land use regulations will not apply to Cherry Crest Farms, Inc.'s use of its property for the

use described in this report, and only to the extent necessary to allow the claimant a use permitted at the time it acquired the property on October 7, 1975.

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 October 7, 1975. On that date, the property was subject to applicable provisions of Goals 3 and 4 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 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 (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 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 October 14, 2005. 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.