

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 )  
COMPENSATION UNDER ORS 197.352 )  
(BALLOT MEASURE 37) OF )  
Glenn Althausser, CLAIMANT )

FINAL ORDER  
CLAIM NO. M118421

Claimant: Glenn Althausser (the Claimant)

Property: Tax lot 300, Township 2S, Range 3E, Section 14, Clackamas 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 Glenn Althausser's division of the 69.67-acre property into ten parcels, or to his establishment of a single-family dwelling on each resulting parcel: applicable provisions of Statewide Planning Goal 4, ORS 215, and OAR 660, division 6. These land use regulations will not apply to Glenn Althausser's use of his property only to the extent necessary to allow him to use the property for the use described in this report, to the extent that use was permitted at the time he acquired the property in 1949.
2. The action by the State of Oregon provides the state's authorization to the claimant to use his property for the use described in this report, subject to the standards in effect in 1949.
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

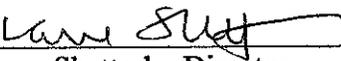
requirements may include, but are not limited to: a building permit, a land use decision, a permit as defined in ORS 215.402 or ORS 227.160, other permits or authorizations from local, state or federal agencies, and restrictions on the use of the property imposed by private parties.

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).

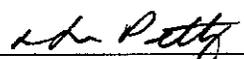
5. Without limiting the generality of the foregoing terms and conditions, in order for the claimant to use the property, it may be necessary for him to obtain a decision under ORS 197.352, from a city and/or county and/or metropolitan service district that enforces land use regulations applicable to 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 21st day of March, 2006.

FOR the DEPARTMENT OF ADMINISTRATIVE  
SERVICES:

  
\_\_\_\_\_  
Dugan Petty, Deputy Administrator  
DAS, State Services Division  
Dated this 21st 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 21, 2006

**STATE CLAIM NUMBER:** M118421

**NAME OF CLAIMANT:** Glenn Althausser

**MAILING ADDRESS:** 25700 Southeast Rebman Road  
Boring, Oregon 97009

**PROPERTY IDENTIFICATION:** Township 2S, Range 3E, Section 14  
Tax Lot 300  
Clackamas County

**DATE RECEIVED BY DAS:** May 12, 2005

**180-DAY DEADLINE:** March 27, 2006<sup>1</sup>

**I. SUMMARY OF CLAIM**

The claimant, Glenn Althausser, seeks compensation in the amount of \$1,600,000 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 69.67-acre property into ten parcels ranging from five-acres to 23.2-acres, and to develop each parcel with a residential dwelling. The property is located at 25700 Southeast Rebman Road, near Boring, in Clackamas 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 Glenn Althausser's division of the property into ten parcels, and to his development of a residential dwelling on each parcel: applicable provisions of Statewide Planning Goal 4 (Forest Lands), ORS 215 and OAR 660, division 6. These laws will not apply to the claimant only to the extent necessary to allow Glenn Althausser to use the property for the use described in

---

<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).

this report, to the extent that use was permitted when he acquired the property in 1949. (See the complete recommendation in Section VI. of this report.)

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

#### **Comments Received**

On June 6, 2005, pursuant to OAR 125-145-0080, the Oregon Department of Administrative Services (DAS) provided written notice to the owners of surrounding properties. According to DAS, two written comments, 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 12, 2005, for processing under OAR 125, division 145. The claim identifies Clackamas County's Timber (TBR) zone 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 of statutory and administrative rule history of the Oregon Revised Statutes and Oregon Administrative Rules.)

---

<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.

## **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, Glenn Althausser, acquired the subject property in 1949, according to information provided by Clackamas County. A copy of a current county tax statement indicates that Glenn Althausser is the current owner of the subject property.

### **Conclusions**

The claimant, Glenn Althausser, is an “owner” of the subject property as that term is defined by ORS 197.352(11)(C), as of 1949.

### **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 states that the property cannot be divided and developed because it is zoned TBR, which does not allow divisions smaller than 80 acres. The claimant states that he intends to divide the property into ten parcels ranging from five-acres to 23.2-acres in size.

The claim is based, generally, on Clackamas County’s TBR zone that was adopted to comply with Statewide Planning Goal 4 (Forest Lands). Goal 4 and laws applicable to land zoned for forest use under ORS 215, including ORS 215.705 to 215.755 and 215.780, and OAR 660, division 6, restrict the right of an owner to divide the property for the purpose of sale and residential use. Goal 4 became effective on January 25, 1975, and required Forest Land, as defined by the Goal, to be zoned for forest use. (See citations to statutory and rule history under OAR 660-015-0000(4).) The Forest Land administrative rule (OAR 660, division 6) became effective September 1, 1982, and ORS 215.705 to 215.755 and 215.780 became effective on

November 4, 1993, (Chapter 792, Oregon Laws 1993) and were adopted into OAR 660-006-0026 and -0027 on March 1, 1994. (See citations to rule history under OAR 660-015-0000(4).)

Together, ORS 215.705 to 215.755 and 215.780 and OAR 660-006-0026 and -0027 establish an 80-acre minimum lot size for the creation of a new parcel in a forest zone and also establish the standards for dwellings in forest zones under Statewide Planning Goal 4.

The claimant acquired the subject property in 1949, prior to the establishment of the statewide planning goals and their implementing statutes and rules. The property was not zoned by Clackamas County at that time.

### **Conclusions**

Provisions of the current minimum lot size and dwelling standards established by Statewide Planning Goal 4, OAR 660-006-0026 and -0027 and the provisions of ORS 215 were adopted after the claimant acquired the property in 1949, and restrict the use of the property relative to uses allowed when Glenn Althausser acquired the property in 1949. Under the current provisions, the claimant is restricted from further dividing or developing his property as he could have when he acquired it.

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 \$1,600,000 as the reduction in the property's fair market value, due to current regulations. This amount is based on the claimant's estimate of the market value of ten residential parcels ranging from five acres to 23.2 acres. No appraisal or other documentation was included with the claim.

### **Conclusions**

As explained in Section V.(1) of this report, the current owner is Glenn Althausser who acquired the property in 1949. Under ORS 197.352, Glenn Althausser 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 \$1,600,000.

Without an appraisal or other documentation, 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 is based on land use regulations that restrict the use of the property relative to what would have been allowed in 1949, when the property was acquired by Glenn Althaus. These provisions include Statewide Planning Goal 4 (Forest Lands) and applicable provisions of ORS 215 and OAR 660, division 33, which Clackamas County has implemented through its TBR zone. None of these laws are exempt under ORS 197.352(3)(E), which exempts laws in effect when the claimant acquired the property.

The department notes that ORS 215.730 and OAR 660, division 6 include standards for siting dwellings in forest zones. Those provisions include fire protection standards for dwellings and for surrounding forest lands. ORS 197.352(3)(B) specifically exempts regulations “restricting or prohibiting activities for the protection of public health and safety, such as fire and building codes...” The department finds that siting standards for dwellings in forest zones in ORS 215.730 and in Goal 4 and its implementing rules (OAR 660, division 6) are exempt under ORS 197.352 (3)(B).

#### **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 forest land apply to the claimant’s use of the property, and these laws are not exempt under ORS 197.352(3)(E).

Laws in effect when the claimant acquired the property are exempt under ORS 197.352(3)(E), and will continue to apply to the claimant’s use of the property. In addition, the siting requirements of ORS 215.730, Goal 4 and its implementing rules related to dwelling siting standards based on health and safety are exempt under ORS 197.352(3)(B) will continue to apply to 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 claimant's ability to divide the property into the desired ten parcels ranging from five-acres to 23.2-acres in size, or to develop each parcel with a residential dwelling. The claim asserts the laws enforced by the Commission or department reduce the fair market value of the subject property by \$1,600,000. Because the claim does not provide an appraisal or other specific documentation for how the specified restrictions reduce the fair market value of 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 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 Glenn Althausser to use the subject property for a use permitted at the time he acquired the property in 1949.

### **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 Glenn Althausser's division of the 69.67-acre property into ten parcels, or to his establishment of a single-family dwelling on each resulting parcel: applicable provisions of Statewide Planning Goal 4, ORS 215, and OAR 660, division 6. These land use regulations will not apply to Glenn Althausser's use of his property only to the extent necessary to allow him to use the property for the use described in this report, to the extent that use was permitted at the time he acquired the property in 1949.

2. The action by the State of Oregon provides the state's authorization to the claimant to use his property for the use described in this report, subject to the standards in effect in 1949.

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 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 October 18, 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.