

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 A
COMPENSATION UNDER ORS 197.352	)	CLAIM NO. M118562
(BALLOT MEASURE 37) OF	)	
Henry and Sandra Vandeberghe and	)	
Bradley Getschman <sup>1</sup> , CLAIMANTS	)	

Claimants: Henry and Sandra Vandeberghe, and Bradley Getschman (the Claimants)

Property: Tax lots 400, 480, and 490, Township 2S, Range 3E, Section 20,  
Clackamas County (the Property)

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

Claimants 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 Henry Vandeberghe's division of the 54.08-acre property (tax lots 400, 480 and 490) into two-acre parcels or to his development of a dwelling on each parcel: applicable provisions of Goals 3, ORS 215 and OAR 660, division 33. These land use regulations will not apply to Henry Vandeberghe only to the extent necessary to allow him to use the subject property for the use described in this report, and only to the extent that use was permitted when he acquired the property on August 22, 1960.
2. The action by the State of Oregon provides the state's authorization to Henry Vandeberghe to use the subject property for the use described in this report, subject to the standards in effect on August 22, 1960.

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<sup>1</sup> Bradley Getschman is a claimant on this claim. However, his ownership interest is limited to tax lots 100 and 2300, which are the subject of the companion Report B prepared on this claim. He does not purport to have any ownership interest in the three tax lots that are the subject of this report. Therefore, his interest is not addressed in this order.

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 Henry Vandenberghe first obtains that permit, license or other form of authorization or consent. Such requirements may include, but are not limited to: a building permit, a land use decision, a "permit" as defined in ORS 215.402 or 227.160, other permits or authorizations from local, state or federal agencies and restrictions on the use of the subject property imposed by private parties.

4. Any use of the subject property by Henry Vandenberghe 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 Henry Vandenberghe to use the subject property, it may be necessary for him to obtain a decision under ORS 197.352 from a city and/or county and/or metropolitan service district that enforces land use regulations applicable to the property. Nothing in this order relieves Henry Vandenberghe from the necessity of obtaining a decision under ORS 197.352 from a local public entity that has jurisdiction to enforce a land use regulation applicable to a use of the subject property by the claimant.

This Order is entered by the Deputy 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

  
\_\_\_\_\_  
George Naughton, Deputy Director  
DLCD

Dated this 14<sup>th</sup> day of April, 2006.

FOR the DEPARTMENT OF ADMINISTRATIVE  
SERVICES:

  
\_\_\_\_\_  
Dugan Petty, Deputy Administrator  
DAS, State Services Division  
Dated this 14<sup>th</sup> day of April, 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>2</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>2</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.

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 B
COMPENSATION UNDER ORS 197.352	)	CLAIM NO. M118562
(BALLOT MEASURE 37) OF	)	
Henry and Sandra Vandeberghe, and	)	
Bradley Getschman, CLAIMANTS	)	

Claimants: Henry and Sandra Vandeberghe, and Bradley Getschman (the Claimants)

Property: Tax lots 100 and 2300, Township 2S, Range 3E, Section 20B and 17, Clackamas County (the Property)

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

Claimants 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 Bradley Getschman and Sandra Vandeberghe's division of the 20.21-acre property (tax lots 100 and 2300) into two-acre parcels or to their development of a dwelling on each parcel: applicable provisions of Goal 3, ORS 215 and OAR 660, division 33, enacted or adopted after January 11, 1992, for Bradley Getschman and May 8, 1995, for Sandra Vandeberghe. The department acknowledges that the relief to which the claimants are entitled under ORS 197.352 will not allow the claimants to use the subject property in the manner set forth in the claim.
  
2. The action by the State of Oregon provides the state's authorization to the claimants to use the property subject to the standards in effect on January 11, 1992, for Bradley Getschman and May 8, 1995, for Sandra Vandeberghe. At those times, the property was subject to applicable provisions of Goal 3, ORS 215 and ORS 660, division 5 (in effect on January 11, 1992) and division 33 (in effect on May 8, 1995).

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 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 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.

This Order is entered by the Deputy 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



George Naughton, Deputy Director  
DLCD

Dated this 14<sup>th</sup> day of April, 2006.

FOR the DEPARTMENT OF ADMINISTRATIVE  
SERVICES:



Dugan Petty, Deputy Administrator  
DAS, State Services Division

Dated this 14<sup>th</sup> day of April, 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**

April 14, 2006

**STATE CLAIM NUMBER:** M118562  
Report A

**NAMES OF CLAIMANTS:** Henry and Sandra Vandenberghe  
Bradley Getschman<sup>1</sup>

**MAILING ADDRESS:** 19432 South Bakers Ferry Road  
Oregon City, Oregon 97045

**PROPERTY IDENTIFICATION:** Township 2S, Range 3E, Section 20  
Tax lots 400, 480, and 490  
Clackamas County

**OTHER CONTACT INFORMATION:** John W. Shonkwiler  
13425 Southwest 72nd Avenue  
Tigard, Oregon 97223

**DATE RECEIVED BY DAS:** June 6, 2005

**180-DAY DEADLINE:** April 21, 2006<sup>2</sup>

**I. SUMMARY OF CLAIM**

The claimants, Henry and Sandra Vandenberghe, seek compensation in the amount of \$14,186,127<sup>3</sup> 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 54.08-acre property into two-acre parcels and to develop a dwelling on each parcel. The subject property is identified as tax lots 400, 480 and 490, in Section 20, Township 2 South, Range 3 East and is located at 19432 S. Bakers Ferry Road, near Oregon City, in Clackamas County. (See claim.)

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<sup>1</sup> Bradley Getschman is a claimant on this claim. However, his ownership interest is limited to tax lots 100 and 2300, which are the subject of the companion Report B prepared on this claim. He does not purport to have any ownership interest in the three tax lots that are the subject of this report. Therefore, his interest is not addressed in this report.

<sup>2</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. Dept. of Admin. Svcs.*, 340 Or \_\_\_, 2006 Ore. Lexis 104 (February 21, 2006).

<sup>3</sup> The compensation amount of \$14,186,127 is the amount claimed for the property addressed in this report and in a companion Report B that addresses other property subject to this 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 as to Henry Vandenberghe. 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 Henry Vandenberghe's division of the 54.08-acre property into two-acre parcels and to his development of a dwelling on each parcel: applicable provisions of Statewide Planning Goal 3 (Agricultural Lands), ORS 215 and Oregon Administrative Rules (OAR) 660, division 33. These laws will not apply to the Henry Vandenberghe only to the extent necessary to allow him to use the subject property for the use described in this report, and only to the extent that use was permitted when he acquired the property in 1960.

Department staff also recommends that the claim be denied as to Sandra Vandenberghe because she is not a current owner of the subject property.<sup>4</sup> (See the complete recommendation in Section VI. of this report.)

## III. COMMENTS ON THE CLAIM

### Comments Received

On August 25, 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.

The comments do not address whether the claim meets the criteria for relief under ORS 197.352 (Ballot Measure 37). Comments concerning the effects a use of the subject 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 waive a state law. (See the comment letters in the department's claim file.)

## IV. TIMELINESS OF CLAIM

### Requirement

ORS 197.352(5) requires that a written demand for compensation be made:

1. For claims arising from land use regulations enacted prior to the effective date of 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 criteria to an application submitted by the owner, whichever is later; or

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<sup>4</sup> Sandra Vandenberghe is not a current owner of the property that is the subject of this staff report and is not referred to as a claimant for the remainder of this report.

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 criteria, whichever is later.

### **Findings of Fact**

This claim was submitted to DAS on June 6, 2005, for processing under OAR 125, division 145. The claim identifies ORS 215.780, 215.213, 215.263 and 215.283 and OAR 660-033-0100, 660-033-0120, 660-033-0130 and 660-033-0135 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 Ballot 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**

Henry and Sandra Vandenberghe acquired the subject property (tax lots 400, 480 and 490) on August 22, 1960, as reflected by a warranty deed included with the claim. On May 7, 1996, Henry and Sandra Vandenberghe conveyed the subject property to Henry, as reflected in a warranty deed included with the claim; Sandra is no longer an owner of this property.

A revised Measure 37 staff report dated October 1, 2005, from Clackamas County verifies that Henry Vandenberghe acquired the subject property on August 22, 1960, and has had a continuous deeded ownership since that date.

### **Conclusions**

Henry Vandenberghe, is an “owner” of the subject property, as that term is defined by ORS 197.352(11)(C), as of August 22, 1960. Sandra Vandenberghe conveyed her entire interest in the property to Henry Vandenberghe on May 7, 1996, and is not a current owner of the subject property as that term is defined by ORS 197.352(11)(C).

## **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 indicates that the claimant desires to divide the 54.08-acre subject property, tax lots 400, 480 and 490, into two-acre parcels, and to develop a dwelling on each parcel. The claim identifies ORS 215.780, 215.213, 215.263 and 215.283 and OAR 660-033-0100, -0120, -0130 and -0135 as laws and rules that restrict the use of the subject property and as the basis for the claim.

The claim is based generally on Clackamas County's current Exclusive Farm Use (EFU) zone and the applicable provisions of state law that require such zoning. The subject property is zoned EFU as required by Goal 3, in accordance with ORS 215 and OAR 660, division 33, because the claimant's property is "agricultural land" as defined by Goal 3. Goal 3 became effective on January 25, 1975, and requires that agricultural lands as defined by the Goal be zoned EFU pursuant to ORS 215.

Current land use regulations, particularly ORS 215.263, 215.284 and 215.780 and OAR 660, division 33, enacted or adopted pursuant to Goal 3, prohibit the division of EFU-zoned land into parcels less than 80 acres and establish standards for development of dwellings on existing or proposed parcels on that land.

ORS 215.780 establishes an 80-acre minimum size for the creation of new lots or parcels in EFU zones and became effective on November 4, 1993 (Chapter 792, Oregon Laws 1993). Clackamas County subsequently incorporated an 80-acre minimum lot size for its EFU zone (Clackamas County Exclusive Farm Use District, Section 401). ORS 215.263 (2005 edition) establishes standards for the creation of new parcels for non-farm uses and dwellings allowed in an EFU zone.

OAR 660-033-0135 (applicable to farm dwellings) became effective on March 1, 1994, and interprets the statutory standard for a primary dwelling in an EFU zone under ORS 215.283(1)(f). OAR 660-033-0130(4) (applicable to non-farm dwellings) became effective on August 7, 1993, and was amended to comply with ORS 215.284(4) on March 1, 1994. The Commission subsequently adopted amendments to comply with House Bill 3326 (Chapter 704, Oregon Laws 2001, effective on January 1, 2002), which were effective on May 22, 2002. (See administrative rule history for OAR 660-033-0100, -0130 and -0135.)

Henry Vandenberghe acquired the subject property on August 22, 1960, prior to the adoption of the statewide planning goals and their implementing statutes and rules.

## **Conclusions**

The current zoning requirements, minimum lot size and dwelling standards established by applicable provisions of Goals 3, ORS 215 and OAR 660, division 33, were all enacted or adopted after Henry Vandenberghe acquired the subject property in 1960 and do not allow the desired division or residential development of the property. These laws restrict the use of the subject property relative to the uses allowed when Mr. Vandenberghe 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 subject 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 subject 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 which laws apply to a use of subject property until there is a specific proposal for that use. When Henry Vandenberghe 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 \$14,186,127 as the reduction in the subject property's fair market value due to current regulations (combined estimated reduction in value for tax lots 400, 480, 490, 100 and 2300).<sup>5</sup> This amount is based on the claimant's estimate of the market value of two-acre buildable parcels in the area. The claim also includes a summary estimating the current real market value of the entire subject property without structural improvements to be approximately \$1,113,873.

## **Conclusions**

As explained in Section V.1 of this report, the claimant is Henry Vandenberghe who acquired the subject property on August 22, 1960. Under ORS 197.352, Henry Vandenberghe 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 enacted or adopted since Mr. Vandenberghe acquired the subject property restrict the desired division and development of the property. The claimant estimates the reduction in value due to the restrictions to be \$14,186,127 for combined tax lots 400, 480 and 490 and tax lots 100 and 2300, which are addressed in a separate staff report.

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<sup>5</sup> The reduction in fair market value due to restrictions from current regulations is estimated for the combined tax lots that are the subject of this claim. Tax lots 100 and 2300 are not the subject of this claim Report A, but are addressed in a companion Report B because of different ownership.

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 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.

#### **4. Exemptions Under ORS 197.352(3)**

ORS 197.352 does not apply to certain land use regulations. In addition, 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 3, ORS 215 and OAR 660, division 33, which Clackamas County has implemented through its current EFU zone. All of these land use regulations were enacted or adopted after Henry Vandenberghe 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 statutory, goal and rule restrictions on residential division and development were in effect when Henry Vandenberghe acquired the subject property in 1960. As a result, these laws are not exempt under ORS 197.352(3)(E).

Laws in effect when Henry Vandenberghe acquired the subject 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 Henry Vandenberghe's 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 subject property until there is a specific proposal for that use. When Mr. Vandenberghe seeks 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).

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

## **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 laws that restrict the use of the subject 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 subject 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 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 claimant's ability to divide the 54.08-acre property into two-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 \$14,186,127. However, because the claim does not provide an appraisal or other specific documentation for how the specified restrictions reduce the fair market value of the subject 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 Henry Vandenberghe to use the subject property for a use permitted at the time he acquired the property on August 22, 1960.

### **Conclusions**

Based on the record, the department recommends that the claim be denied as to Sandra Vandenberghe because she is not a current owner of the subject property. The department further recommends that the claim be approved as to Henry Vandenberghe, 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 Henry Vandenberghe's division of the 54.08-acre property (tax lots 400, 480 and 490) into two-acre parcels or to his development of a dwelling on each parcel: applicable provisions of Goals 3, ORS 215 and OAR 660, division 33. These land use regulations will not apply to Henry Vandenberghe only to the extent necessary to allow him to use the subject property for the use described in this report, and only to the extent that use was permitted when he acquired the property on August 22, 1960.
2. The action by the State of Oregon provides the state's authorization to Henry Vandenberghe to use the subject property for the use described in this report, subject to the standards in effect on August 22, 1960.

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 Henry Vandenberghe first obtains that permit, license or other form of authorization or consent. Such requirements may include, but are not limited to: a building permit, a land use decision, a "permit" as defined in ORS 215.402 or 227.160, other permits or authorizations from local, state or federal agencies and restrictions on the use of the subject property imposed by private parties.

4. Any use of the subject property by Henry Vandenberghe 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 Henry Vandenberghe to use the subject property, it may be necessary for him to obtain a decision under ORS 197.352 from a city and/or county and/or metropolitan service district that enforces land use regulations applicable to the property. Nothing in this order relieves Henry Vandenberghe from the necessity of obtaining a decision under ORS 197.352 from a local public entity that has jurisdiction to enforce a land use regulation applicable to a use of the subject property by the claimant.

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

The department issued its draft staff report on this claim on March 20, 2006. OAR 125-145-0100(3), provided 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. Comments received have been taken into account by the department in the issuance of this final report.

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

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

April 14, 2006

**STATE CLAIM NUMBER:** M118562  
Report B

**NAMES OF CLAIMANTS:** Henry and Sandra Vandeberghe  
Bradley Getschman

**MAILING ADDRESS:** 19432 South Bakers Ferry Road  
Oregon City, Oregon 97045

**PROPERTY IDENTIFICATION:** Township 2S, Range 3E, Section 20B and 17  
Tax lots 100 and 2300  
Clackamas County

**OTHER CONTACT INFORMATION:** John W. Shonkwiler  
13425 Southwest 72nd Avenue  
Tigard, Oregon 97223

**DATE RECEIVED BY DAS:** June 6, 2005

**180-DAY DEADLINE:** April 21, 2006<sup>1</sup>

**I. SUMMARY OF CLAIM**

The claimants, Henry and Sandra Vandeberghe and Bradley Getschman, seek compensation in the amount of \$14,186,127<sup>2</sup> 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 20.21-acre property into two-acre parcels and to develop a dwelling on each parcel. The subject property is identified as tax lots 100 and 2300 in Section 20B and 17, Township 2 South, Range 3 East, near Oregon City, in Clackamas 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. Dept. of Admin. Svcs.*, 340 Or \_\_\_, 2006 Ore. Lexis 104 (February 21, 2006).

<sup>2</sup> The compensation amount of \$14,186,127 is the amount claimed for the property addressed in this report and a companion Report A that addresses other property subject to this 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 as to claimants Sandra Vandeberghe and Bradley Getschman. 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 Sandra Vandeberghe and Bradley Getschman's division of the 20.21-acre property into two-acre parcels and to their development of a dwelling on each parcel: applicable provisions of Statewide Planning Goal 3 (Agricultural Lands), ORS 215 and Oregon Administrative Rules (OAR) 660, division 33, enacted or adopted after January 11, 1992, for Bradley Getschman and after May 8, 1995, for Sandra Vandeberghe. These laws 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 they acquired the property. The department acknowledges that the relief to which the claimants are entitled under ORS 197.352 will not allow the claimants to use the subject property in the manner set forth in the claim.

Department staff also recommends that the claim be denied as to Henry Vandeberghe because he is not an owner of the subject property.<sup>3</sup> (See the complete recommendation in Section VI. of this report.)

## III. COMMENTS ON THE CLAIM

### Comments Received

On August 25, 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.

The comments do not address whether the claim meets the criteria for relief under ORS 197.352 (Ballot Measure 37). 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 waive a state law. (See the comment letters in the department's claim file.)

## IV. TIMELINESS OF CLAIM

### Requirement

ORS 197.352(5) requires that a written demand for compensation be made:

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<sup>3</sup> Henry Vandeberghe is not a current owner of the property that is the subject of this report and is not referred to as a claimant for the remainder of this report.

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 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 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 criteria, whichever is later.

### **Findings of Fact**

This claim was submitted to DAS on June 6, 2005, for processing under OAR 125, division 145. The claim identifies ORS 215.780, 215.213, 215.263 and 215.283 and OAR 660-033-0100, 660-033-0120, 660-033-0130 and 660-033-0135 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 Ballot 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**

Henry Vandenberghe’s parents acquired the subject property on June 3, 1960, by a warranty deed. Henry Vandenberghe acquired an interest the subject property from his parents on March 2, 1979, as reflected by county assessor records included with the claim. On May 8, 1995, Henry Vandenberghe and his wife, claimant Sandra Vandenberghe, acquired an additional interest in the property, which is also reflected by county assessor records included with the claim. On May 7, 1996, Henry and Sandra Vandenberghe transferred their interest in the subject property to Sandra by a warranty deed included with the claim. As a result, claimant Henry Vandenberghe no longer has any ownership interest in this property. Their son-in-law, Bradley Getschman, acquired an interest in the subject property on January 11, 1992, by a land sale contract included with the claim.

A draft staff report issued by Clackamas County for a county Measure 37 claim (#ZC139-05) shows Sandra Vandeberghe and Bradley Getschman as the current owners of the subject property.

### **Conclusions**

Claimants Sandra Vandeberghe and Bradley Getschman are “owners” of the subject property, as that term is defined by ORS 197.352(11)(C). Bradley Getschman has been an owner since January 11, 1992; Sandra Vandeberghe has been an owner since May 8, 1995.

On May 7, 1996, Henry Vandeberghe conveyed his ownership interest in the subject property to his wife Sandra and is not an owner of the property, as that term is defined by ORS 197.352(11)(C).

A “family member” of the claimants, as defined in ORS 197.352(11)(A), acquired an interest in the subject property in 1960.

### **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 20.21-acre property, tax lots 100 and 2300, into two-acre parcels and to develop a dwelling on each parcel. The claim identifies ORS 215.780, 215.213, 215.263 and 215.283 and OAR 660-033-0100, 660-033-0120, 660-033-0130 and 660-033-0135 as laws and rules that restrict that desired development.

The claim is based generally on Clackamas County’s current Exclusive Farm Use (EFU) zone and the applicable provisions of state law that require such zoning. The claimants’ property is zoned EFU as required by Goal 3 in accordance with ORS 215 and OAR 660, division 33, because the claimants’ property is “agricultural land” as defined by Goal 3.<sup>4</sup> Goal 3 became effective on January 25, 1975, and requires that agricultural lands as defined by the Goal be zoned EFU pursuant to ORS 215.

Current land use regulations, particularly ORS 215.263, 215.284 and 215.780 and OAR 660, division 33, enacted or adopted pursuant to Goal 3, prohibit the division of EFU-zoned land into parcels less than 80 acres and establish standards for the development of dwellings on existing or any proposed parcel on that land.

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<sup>4</sup> The claimants’ property is “agricultural land” and high value because it contains Natural Resources Conservation Service Class I-IV soils: Newberg silt loam, Class IIw and Cloquato silt loam, Class IIw.

ORS 215.780 establishes an 80-acre minimum size for the creation of new lots or parcels in EFU zones and became effective on November 4, 1993 (Chapter 792, Oregon Laws 1993). ORS 215.263 (2005 edition) establishes standards for the creation of new parcels for non-farm uses and dwellings allowed in an EFU zone.

OAR 660-033-0135 (applicable to farm dwellings) became effective on March 1, 1994, and interprets the statutory standard for a primary dwelling in an EFU zone under ORS 215.283(1)(f). OAR 660-033-0130(4) (applicable to non-farm dwellings) became effective on August 7, 1993, and was amended to comply with ORS 215.284(4) on March 1, 1994. The Commission subsequently adopted amendments to comply with House Bill 3326 (Chapter 704, Oregon Laws 2001, effective on January 1, 2002), which became effective on May 22, 2002. (See administrative rule history for OAR 660-033-0100, -0130 and -0135.)

The claimants' family first acquired the subject property on June 3, 1960, prior to the adoption of the statewide planning goals and their implementing statutes and rules. No county zoning applied to the subject property on June 3, 1960.

### **Conclusions**

The current zoning requirements, minimum lot size and dwelling standards established by applicable provisions of Goal 3, ORS 215 and OAR 660, division 33, were all enacted or adopted after the claimants' family acquired the subject property. These laws restrict the use of the subject property relative to the uses allowed when the claimants' family acquired the property.

### **3. Effect of Regulations on Fair Market Value**

In order to establish a valid claim, ORS 197.352(1) requires that 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 \$14,186,127 as the reduction in the subject property's fair market value due to current regulations (combined estimated reduction in value for tax lots 400, 480, 490, 100 and 2300).<sup>5</sup> This amount is based on the claimants' estimate of the market value of two-acre buildable parcels in the area. The claim also includes a summary estimating the current real market value of the entire subject property without structural improvements to be approximately \$1,113,873.

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<sup>5</sup> The reduction in fair market value due to restrictions from current regulations is estimated for the combined tax lots that are subject to this claim. Tax lots 400, 480 and 490 are subject to this claim, but are addressed in a companion Report A because of differing ownership.

## **Conclusions**

As explained in Section V.1 of this report, the claimants are Sandra Vandenberghe and Bradley Getschman whose family acquired the subject property in 1960. Under ORS 197.352, these claimants are 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 enacted or adopted since these claimants' family acquired the subject property restrict the desired division and development of the property. The claimants estimate the reduction in value due to the restrictions to be \$14,186,127 for combined tax lots 100 and 2300 and tax lots 400, 480 and 490, which are addressed in a separate report. Without an appraisal or other documentation, it is not possible to substantiate the specific dollar amount the claimants demand for compensation. Nevertheless, based on the submitted information, the department determines that it 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 enforced by the Commission or the department since the claimants' family acquired the property.

### **4. Exemptions Under ORS 197.352(3)**

ORS 197.352 does not apply to certain land use regulations. In addition, under ORS 197.352(3), certain types of laws are exempt from ORS 197.352.

### **Findings of Fact**

The claim is based on state land use regulations that restrict the use of the subject property relative to the uses permitted when the claimants' family acquired the property, including applicable provisions of Goal 3, ORS 215 and OAR 660, division 33, which Clackamas County has implemented through its current EFU zone. All of these land use regulations were enacted or adopted after the claimants' family acquired the subject property.

### **Conclusions**

It appears that none of the general statutory, goal and rule restrictions on residential division and development of the subject property were in effect when the claimants' family acquired the property on June 3, 1960. As a result, these laws are not exempt under ORS 197.352(3)(E). Laws in effect when the claimants' family acquired the subject property are exempt under ORS 197.352(3)(E), and do not provide a basis for compensation. In addition, other land use laws enacted or adopted for a purpose set forth in ORS 197.352(3)(A) to (D) are also exempt, and would not provide a basis for compensation.

## **VI. FORM OF RELIEF**

ORS 197.352(1) provides for payment of compensation to an owner of private real property if the Commission or the department has enforced 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 current 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' ability to divide the 20.21-acre property into two-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 \$14,186,127. However, because the claim does not provide an appraisal or other specific documentation for how the specified restrictions reduce the fair market value of the subject 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 Bradley Getschman and Sandra Vandenberghe to use the subject property for a use permitted at the time Bradley Getschman acquired the property on January 11, 1992, and at the time Sandra Vandenberghe acquired the property on May 8, 1995.

At the time these claimants acquired an interest in the subject property, it was subject to Clackamas County's acknowledged EFU zone.<sup>6</sup> When Bradley Getschman acquired the property on January 11, 1992, it was subject to the requirements of Goal 3, ORS 215 and OAR 660, division 5, then in effect. When Sandra Vandenberghe acquired the property on May 8, 1995, it was subject to the current lot size and dwelling standards under Goals 3, ORS 215 and OAR 660, division 33, and as described in Section V.2 of this report.

In addition to the applicable provisions of Goal 3, ORS 215 and OAR 660, division 5, in effect on January 11, 1992 (Bradley Getschman) and OAR 660, division 33, in effect on May 8, 1995 (Sandra Vandenberghe), and other laws in effect when the claimants acquired the subject property, there may be other laws that apply to the claimants' 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 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 and, depending on when they were enacted or adopted, may continue to apply to the claimants' property. In addition, some of these laws may be exempt under ORS 197.352(3)(A) to (D) and will continue to apply to the subject property on that basis.

This report addresses only those state laws that are identified in the claim, or that the department is certain apply to the subject property based on the uses that the 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

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<sup>6</sup> Clackamas County's EFU zone was acknowledged for compliance with Goal 3 and OAR 660, division 5, in 1982 and 1983.

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 denied as to Henry Vandenberghe because he is not a current owner of the subject property. The department further recommends that the claim be approved as to claimants Bradley Getschman and Sandra Vandenberghe, 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 Bradley Getschman and Sandra Vandenberghe's division of the 20.21-acre property (tax lots 100 and 2300) into two-acre parcels or to their development of a dwelling on each parcel: applicable provisions of Goal 3, ORS 215 and OAR 660, division 33, enacted or adopted after January 11, 1992, for Bradley Getschman and May 8, 1995, for Sandra Vandenberghe. The department acknowledges that the relief to which the claimants are entitled under ORS 197.352 will not allow the claimants to use the subject property in the manner set forth in the claim.
2. The action by the State of Oregon provides the state's authorization to the claimants to use the property subject to the standards in effect on January 11, 1992, for Bradley Getschman and May 8, 1995, for Sandra Vandenberghe. At those times, the property was subject to applicable provisions of Goal 3, ORS 215 and ORS 660, division 5 (in effect on January 11, 1992) and division 33 (in effect on May 8, 1995).
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 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 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. COMMENTS ON THE DRAFT STAFF REPORT**

The department issued its draft staff report on this claim on March 20, 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.