

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. M 118590  
(BALLOT MEASURE 37) OF )  
Thomas Burke and Educative, LLC, CLAIMANTS )

Claimants: Thomas Burke and Educative, LLC (the Claimants)

Property: Township 2S, Range 3E, Section 2D, Tax lot 100, 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 denied as to laws administered by DLCD and the Land Conservation and Development Commission (LCDC) for the reasons set forth in the DLCD Report.

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 chapter 125, division 145, and by the Administrator for the State Services Division of the DAS as a final order of DAS under ORS 197.352, OAR chapter 125, division 145, and ORS chapter 293.

FOR DLCD AND THE LAND  
CONSERVATION AND DEVELOPMENT  
COMMISSION:



Lane Shetterly, Director  
DLCD

Dated this 21<sup>st</sup> day of April, 2006.

FOR the DEPARTMENT OF  
ADMINISTRATIVE SERVICES:



David Hartwig Administrator  
DAS, State Services Division

Dated this 21<sup>st</sup> day of April, 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 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)

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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.

**ORS 197.352 (BALLOT MEASURE 37) CLAIM FOR COMPENSATION**  
**OREGON DEPARTMENT OF LAND CONSERVATION AND DEVELOPMENT**  
**Final Staff Report and Recommendation**

April 21, 2006

**STATE CLAIM NUMBER:** M118590

**NAMES OF CLAIMANTS:** Thomas Burke and  
Educative, LLC

**MAILING ADDRESSES:** Thomas Burke  
26075 Southeast Highway 212  
Boring, Oregon 97009

Educative, LLC  
c/o John Griffin  
14875 Southeast 262nd Avenue  
Boring, Oregon 97009

**PROPERTY IDENTIFICATION:** Township 2S, Range 3E, Section 2D  
Tax lot 100  
Clackamas County

**OTHER CONTACT INFORMATION:** Gary P. Shepherd, attorney at law  
3115 Southeast Salmon Street  
Portland, Oregon 97214

**OTHER INTEREST IN PROPERTY:** Portland General Electric (electric  
transmission and underground distribution line  
easements) and water pipe easement

**DATE RECEIVED BY DAS:** June 13, 2005

**180-DAY DEADLINE:** April 28, 2006<sup>1</sup>

**I. SUMMARY OF CLAIM**

The claimants, Thomas Burke and Educative, LLC, seek compensation in the amount of \$1 million to \$1.2 million 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 17.95-acre property into eight 2-acre parcels and to

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<sup>1</sup> This date reflects 180 days from the date the claim was submitted, as extended by the 139 days that all timelines under Measure 37 were suspended during the pendency of *MacPherson v. Dept. of Admin. Svcs.*, 340 Or 117 (2006).

develop a dwelling on each parcel.<sup>2</sup> The subject property is located at 26075 SE Highway 212, less than one mile from the Portland area Urban Growth Boundary, 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 not valid as to Educative, LLC because its desired use of the subject property was prohibited under the laws in effect when Educative, LLC acquired the property in 2005. The claim is not valid as to Thomas Burke because neither the Land Conservation and Development Commission (the Commission) nor the department has enforced laws that restrict Thomas Burke's limited ownership interest in the property. (See the complete recommendation in Section VI. of this report.)

## III. COMMENTS ON THE CLAIM

### Comments Received

On August 26, 2005, pursuant to Oregon Administrative Rules (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. Comments concerning the effects a use of the subject property may have on surrounding areas are generally 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 Measure 37 (December 2, 2004), within two years of that effective date or the date the public entity applies the land use regulation as an approval criterion to an application submitted by the owner, whichever is later; or
2. For claims arising from land use regulations enacted after the effective date of Measure 37 (December 2, 2004), within two years of the enactment of the land use regulation, or the date the owner of the property submits a land use application in which the land use regulation is an approval criterion, whichever is later.

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<sup>2</sup> The claim also states, "Claimant seeks to create, sell and/or develop the maximum number of lots and uses the land will support."

### **Findings of Fact**

This claim was submitted to DAS on June 13, 2005, for processing under OAR 125, division 145. The claim identifies Goals 2, 3, 4 and 5 and OAR 660, divisions 4, 6, 14, 16, 23, and 33, and “all Statewide Planning Goals, Administrative Rules, and Oregon Statutes (including applicable provisions in ORS Chapters 92, 197, 215, and 227) enacted and enforced since ownership by claimant,” as the basis for the claim. Only laws that were enacted prior to December 2, 2004, are the basis for this claim.

### **Conclusions**

The claim has been submitted within two years of the effective date of Measure 37 (December 2, 2004), based on land use regulations enacted prior to December 2, 2004, and is therefore timely filed.

## **V. ANALYSIS OF CLAIM**

### **1. Ownership**

ORS 197.352 provides for payment of compensation or relief from specific laws for “owners” as that term is defined in ORS 197.352. ORS 197.352(11)(C) defines “owner” as “the present owner of the property, or any interest therein.”

### **Findings of Fact**

Claimant Thomas Burke acquired the subject property on August 30, 1967, as reflected by a deed included with the claim. On March 8, 2005, Thomas Burke sold the property to John M. Griffin by a land sale contract included with the claim. Through that contract, Thomas Burke retained a right to possess one dwelling on the property until December 31, 2006, and transferred the remainder of his ownership interest to John M. Griffin.

Claimant Educative, LLC acquired an interest in the subject property from John M. Griffin on April 11, 2005, through a purchaser’s assignment of contract and deed included with the claim.

Clackamas County Assessor’s Office records included with the claim show John M. Griffin as the contract purchaser of the property.

### **Conclusions**

Claimant Thomas Burke is an “owner” of an interest in the subject property as that term is defined by ORS 197.352(11)(C), as of August 30, 1967, and until December 31, 2006.

Claimant Educative, LLC is an “owner” of the subject property as that term is defined by ORS 197.352(11)(C), as of April 11, 2005.

## **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 17.95-acre property into eight 2-acre lots and develop a dwelling on each lot. The claim identifies Goals 2, 3, 4 and 5 and OAR 660, divisions 4, 6, 14, 16, 23, and 33, and "all Statewide Planning Goals, Administrative Rules, and Oregon Statutes (including applicable provisions in ORS Chapters 92, 197, 215, and 227)" as laws that restrict the use of the subject property.

The claim summarily cites the statewide planning goals and numerous provisions of ORS and OAR that do not, on their face, appear to restrict the use of the subject property. With the exception of laws discussed below, in the absence of any explanation by the claimants as to how these regulations restrict the use of the subject property, this report does not address these regulations further.

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>3</sup> Goal 3 became effective on January 25, 1975, and required that agricultural lands as defined by the Goal be zoned EFU pursuant to ORS 215.

Current land use regulations, particularly ORS 215.263, 215.284 and 215.780 and OAR 660, division 33, enacted or adopted pursuant to Goal 3, prohibit the division of EFU-zoned land into parcels smaller 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). 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.)

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<sup>3</sup> The claimants' property is "agricultural land" because it contains Natural Resources Conservation Service Class I-IV soils.

Claimant Thomas Burke acquired the subject property on August 30, 1967, prior to the adoption of the statewide planning goals and their implementing statutes and rules. He sold the subject property to John Griffin on March 8, 2005, after the adoption of the statewide planning goals and their implementing statutes and rules, retaining a possessory interest in the subject property through December 31, 2006.

Claimant Educative, LLC acquired the subject property on April 11, 2005, after 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 Goal 3, ORS 215 and OAR 660, division 33, were all enacted or adopted after claimant Thomas Burke acquired the subject property in 1967 and do not allow the desired division or residential development of the property. However, the claim does not establish and there is no evidence in the record to otherwise establish that those laws in any way restrict Mr. Burke's current ownership interest in the subject property: the right to possess an existing dwelling until December 31, 2006.

The current zoning requirements, minimum lot size and dwelling standards established by Goal 3 and provisions applicable to land zoned EFU in ORS 215 and OAR 660, division 33, were all enacted or adopted before Educative, LLC acquired the subject property on April 11, 2005. These land use regulations do not allow Educative, LLC's desired division or residential development of the subject 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 \$1 million to \$1.2 million as the reduction in the subject property's fair market value due to current regulations. This amount is based on eight additional parcels for residential development at \$125,000 to \$150,000 each, based on recent sales of similar properties in the vicinity. The claim does not include an appraisal to substantiate these amounts.

### **Conclusions**

As explained in Section V. (1) of this report, Thomas Burke and Educative, LLC are the claimants. Thomas Burke acquired the subject property in 1967. However, he sold the property on March 8, 2005, and his current interest in the subject property is limited to the right to possess an existing dwelling until December 31, 2006. No state land use regulations restrict that right in a manner that reduces the property's fair market value. Educative, LLC acquired the subject property on April 11, 2005. No state laws enacted or adopted since Educative, LLC acquired the subject property restrict its use of the property relative to the uses allowed in 2005. Therefore,

the fair market value of the subject property has not been reduced 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 does not identify any state land use regulations enacted or adopted since Educative, LLC acquired the subject property that restrict its use of the property relative to what would have been allowed when it acquired ownership on April 11, 2005. As set forth in Section V. (2) of this report, the state land use regulations restricting the Educative, LLC's desired use of the subject property were in effect when Educative, LLC acquired the property in 2005.

As explained in Section V.(2) of this report, Thomas Burke has not established that any state laws restrict his use of the subject property. Accordingly, the department cannot determine that any exemptions under ORS 197.352(3) apply to Thomas Burke's claim.

#### **Conclusions**

Thomas Burke has not established that any state laws restrict his use of the subject property. All of the state land use regulations that restrict Educative, LLC's desired use of the subject property were in effect when the claimants acquired their current interest in the property. Therefore, these state land use regulations are exempt under ORS 197.352(3)(E), which exempts laws in effect when Educative, LLC acquired 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 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 do not restrict the claimants' ability to divide the 17.95-acre property into eight parcels and to develop a dwelling on each parcel, relative to Thomas Burke's limited possessory interest in the property or relative to what was permitted when Educative, LLC acquired the subject property in 2005.

## **Conclusions**

Based on the record and the foregoing findings and conclusions, the claimants have not established that they are entitled to relief under ORS 197.352(1) as a result of land use regulations enforced by the Commission or the department. Therefore, this claim is denied.

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

The department issued its draft staff report on this claim on March 30, 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.