

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 ) FINAL ORDER  
(BALLOT MEASURE 37) OF ) CLAIM NO. M 118406  
William and Iris Loshbaugh, CLAIMANTS )

Claimants: William and Iris Loshbaugh (the Claimants)

Property: Township 30S, Range 15W, Section 1, Tax lot 1901  
Township 30S, Range 15W, NE 1/4 Section 12  
Tax lot 600  
Coos County (the property)

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

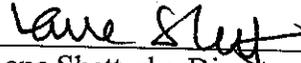
Claimants submitted the Claim to the State of Oregon under ORS 197.352. Under OAR 125-145-0010 *et seq.*, the Department of Administrative Services (DAS) referred the Claim to the Department of Land Conservation and Development (DLCD) as the regulating entity. This order is based on the record herein, 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 Deputy 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.

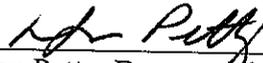
FOR DLCD AND THE LAND  
CONSERVATION AND DEVELOPMENT  
COMMISSION:



Lane Shetterly, Director  
DLCD

Dated this 15<sup>th</sup> day of May, 2006.

FOR the DEPARTMENT OF  
ADMINISTRATIVE SERVICES:



Dugan Petty, Deputy Administrator  
DAS, State Services Division

Dated this 15<sup>th</sup> day of May, 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)

<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**

May 15, 2006

**STATE CLAIM NUMBER:** M118706

**NAMES OF CLAIMANTS:** William and Iris Loshbaugh

**MAILING ADDRESS:** PO Box 857  
Bandon, Oregon 97411

**PROPERTY IDENTIFICATION:** Township 30S, Range 15W, Section 1  
Tax lot 1901

Township 30S, Range 15W,  
NE 1/4 Section 12  
Tax lot 600

Coos County

**DATE RECEIVED BY DAS:** July 5, 2005

**180-DAY DEADLINE:** May 20, 2006<sup>1</sup>

**I. SUMMARY OF CLAIM**

The claimants, William and Iris Loshbaugh, seek compensation in the amount of \$300,000 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 claimants desire compensation or the right to divide the subject 29.61-acre property and develop a dwelling on each parcel. The subject property has no street address and is located at the locational coordinates listed above in Coos 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 because the claimants' desired use of the subject property was prohibited under the laws in effect when the claimants' family acquired the property on May 11, 1994. (See the complete recommendation in Section VI. of this report.)

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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).

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

#### **Comments Received**

On September 12, 2005, pursuant to OAR 125-145-0080, the Oregon Department of Administrative Services (DAS) provided written notice to the owners of surrounding property. According to DAS, no written comments were received in response to the 10-day notice.

### **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 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 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 July 5, 2005, for processing under OAR 125, division 145. The claim identifies Coos County Zoning and Land Development Ordinance Section 4.9.900-Land Divisions for EFU land and Section 4.4.800-Land Divisions in Forest Zones 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 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**

On December 22, 2003, the claimants, William and Iris Loshbaugh, acquired the two tax lots that compose the subject property, tax lots 600 and 1901, from EV Acres, a partnership owned by the claimants, as reflected by warranty deeds included with the claim. EV Acres acquired the subject property on May 11, 1994, as reflected by Coos County Assessor's records included with the claim.<sup>2</sup> The Coos County Assessor's Office confirms the claimants' current ownership of the subject property.

## **Conclusions**

The claimants, William and Iris Loshbaugh, are owners of the subject property as that term is defined by ORS 197.352(11)(C) as of December 22, 2003. EV Acres is a "family member" as defined by ORS 197.352(11)(A) and acquired the subject property on May 11, 1994.

## **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 are "unable to divide land to allow children to have homesites" due to land use laws restricting the use of the subject property.

The claim for tax lot 600 is based on Coos County's current Exclusive Farm Use (EFU) zone and the applicable provisions of state law that require such zoning. Tax lot 600 is zoned EFU as required by Statewide Planning Goal 3 (Agricultural Lands) 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 3 be zoned EFU pursuant to ORS 215.

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<sup>2</sup> A copy of a warranty deed submitted with the claim indicates that William Loshbaugh acquired an interest in tax lot 600 from Viola Loshbaugh on February 11, 1974. That property was subsequently transferred to Loshbaugh, Inc. and in 1994, to the possession of a partnership, EV Acres. William and Iris Loshbaugh, along with other persons, were partners in EV Acres. The Loshbaughs acquired tax lot 1901 and transferred that portion of the subject property to the EV Acres partnership in 1994. On December 22, 2003, William and Iris Loshbaugh, acting as partners in EV Acres, transferred ownership of the subject property to their private ownership.

Although a partnership can be a "family member" of an owner as that term is defined by ORS 197.352(11)(C), an "owner" that is a partnership entity cannot claim an individual as a "family member," as defined in ORS 197.352(11)(A). None of the individual partners, including William and Iris Loshbaugh, who transferred the subject property to EV Acres can be considered a "family member" of EV Acres. Therefore, the transfer of the property to EV Acres in 1994 establishes the date of family ownership for the purposes of this claim.

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

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).

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.)

The claimants' family acquired tax lot 600 on May 11, 1994. At that time, tax lot 600 was subject to Coos County's acknowledged EFU zone. When the claimants' family acquired tax lot 600, the desired division and development of the property would have been governed by the county's EFU zone and the applicable provisions of ORS 215 and OAR 660, division 33, currently in effect.

The claim for tax lot 1901 is based on Coos County's current Forest zone and the applicable provisions of state law that require such zoning. Tax lot 1901 is zoned Forest as required by Goal 4 (Forest Lands) in accordance with ORS 215 and OAR 660, division 6, because the claimants' property is "forest land" as defined by Goal 4. Goal 4 became effective on January 25, 1975, and required that forest lands as defined by the Goal 4 be zoned for forest use (see statutory and rule history under OAR 660-015-0000(4)). The forest land administrative rules (OAR 660, division 6) became effective on September 1, 1982, and ORS 215.705 to 215.755 became effective on November 4, 1993 (Chapter 792, Oregon Laws 1993). OAR 660-006-0026 and 660-006-0027 were amended on March 1, 1994, to implement those statutes.

On May 11, 1994, tax lot 1901 was subject to Coos County's acknowledged Forest zone. When the claimants' family acquired tax lot 1901, the desired division and development of the tax lot would have been governed by the county's Forest zone and the applicable provisions of ORS 215 and OAR 660, division 6, currently in effect.

### **Conclusions**

The current zoning requirements, minimum lot size and dwelling standards established by Goals 3 and 4 and provisions applicable to land zoned agriculture and forest in ORS 215 and OAR 660, divisions 33, and 6, were all enacted or adopted before the claimants' family acquired the subject property on May 11, 1994. These land use regulations do not allow the desired division and development of dwellings on the subject property. Laws enacted or adopted since

the claimants acquired the subject property in 2003 do not restrict the claimants' desired use of the property relative to when the claimants acquired it.

### **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 \$300,000 as the reduction in the subject property's fair market value due to current regulations. This amount is based on the claimants' own estimate.

#### **Conclusions**

As explained in Section V.(1) of this report, the claimants' family acquired the subject property on May 11, 1994. No state laws enacted or adopted since the claimants' family acquired the subject property restrict the use of the property relative to the uses allowed in 2003. 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 the claimants' family acquired the subject property that restrict the use of the property relative to what would have been allowed when the claimants' family acquired it on May 11, 1994. As set forth in Section V.(2) of this report, the state land use regulations restricting the claimants' desired use of the subject property were in effect when the claimants' family acquired the property in 1994.

#### **Conclusions**

All of the state land use regulations that restrict the claimants' desired use of the subject property were in effect when the claimants acquired the property. Therefore, these state land use regulations are exempt under ORS 197.352(3)(E), which exempts laws in effect when the claimants 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 one or more 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' desired use of the subject property relative to what was permitted when the claimants' family acquired it in 1994 and do not reduce the fair market value of the property. All state laws restricting the use of the subject property are exempt under ORS 197.352(3)(E).

### **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, the department recommends that this claim be denied.

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

The department issued its draft staff report on this claim on April 26, 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.