

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. M129663  
(BALLOT MEASURE 37) OF )  
Don and Cheryl Wobbe, CLAIMANTS )

Claimants: Don and Cheryl Wobbe (the Claimants)

Property: Township 16S, Range 4W, Section 33, Tax lot 1001, Lane 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

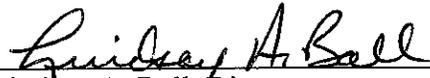
The Claim is denied as to laws administered by DLCD and the Land Conservation and Development Commission (LCDC) for the reasons set forth in the DLCD Report.

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 Director 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

  
Michael Morrissey, Manager  
DLCD, Measure 37 Services Division  
Dated this 5<sup>th</sup> day of January, 2007.

FOR THE DEPARTMENT OF  
ADMINISTRATIVE SERVICES:

  
Lindsay A. Ball, Director  
DAS, State Services Division  
Dated this 5<sup>th</sup> day of January, 2007.

**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, 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)

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

January 5, 2007

**STATE CLAIM NUMBER:** M129663

**NAMES OF CLAIMANTS:** Don and Cheryl Wobbe

**MAILING ADDRESS:** 2442 NW Market Street #415  
Seattle, Washington 98107

**PROPERTY IDENTIFICATION:** Township 16S, Range 4W, Section 33  
Tax lot 1001  
Lane County

**OTHER CONTACT INFORMATION:** Michael Farthing  
767 Willamette St., Ste. 203  
Eugene, Oregon 97401

**OTHER INTEREST IN PROPERTY:** Phil Collins (lessee)  
90920 Brown Lane  
Eugene, Oregon 97402

**DATE RECEIVED BY DAS:** July 13, 2006

**180-DAY DEADLINE:** January 9, 2007

**I. SUMMARY OF CLAIM**

The claimants, Don and Cheryl Wobbe, seek compensation in the amount of \$315,000 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 develop the 25.27-acre property with a "warehouse and distribution center" that would have been permitted under Lane County's M-2 industrial zone in effect in 1975.<sup>1</sup> The subject property is located at 90920 Brown Lane, near Eugene, in Lane County. (See claim.)

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<sup>1</sup> As initially filed, the claimants asserted that their desired use of the property was "commercial structures associated with commercial warehouse, storage and distribution activities." In response to department staff's request for clarification of the desired use, the claimants' attorney responded that "the uses allowed in [the M-1 and M-2 zones in 1975] are the uses that the Wobbes would propose for their property." He further explained that the comparable property for appraisal purposes in determining the estimated reduction in fair market value was a "new warehouse and distribution center" and that "this use, or something similar, is the likely use of the subject property."

ORS 197.352 authorizes the department to waive land use regulations to allow "a use" permitted at the time the claimants acquired the property that, due to current regulations, the claimants cannot now pursue. It does not

## 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 acquired the property in 1975. (See the complete recommendation in Section VI of this report.)

## III. COMMENTS ON THE CLAIM

### Comments Received

On October 9, 2006, 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, one written comment was received in response to the 10-day notice.

The comment does 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 letter 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 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.

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eliminate zoning or allow any and all uses that may have been permitted. Because the claimants' description of the desired use that they can no longer be pursue continues to be unclear, the department concludes that, to the extent the estimated reduction in value is premised on the use of the property for a "new warehouse and distribution center" that would have been permitted under Lane County's M-2 zone in effect in 1975, this use best describes the claimants' desired use. The claim makes no representation that this use could be construed to be in conjunction with farm use. Rather, as described by the claimant's attorney, the use would not be in conjunction with farm use, but rather would be considered "industrial storage."

### **Findings of Fact**

This claim was submitted to DAS on July 13, 2006, for processing under OAR 125, division 145. The claim identifies EFU-40, LC 16.212 and “all regulations, requirements, statutes or other administrative direction that were enacted after December 2, 1975,” 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**

The claimants, Don and Cheryl Wobbe, acquired the subject property on December 2, 1975, as reflected by a deed included with the claim. The Lane County Assessor’s Office confirms the claimants’ current ownership of the subject property.

### **Conclusions**

The claimants, Don and Cheryl Wobbe, are “owners” of the subject property as that term is defined by ORS 197.352(11)(C), as of December 2, 1975.

### **2. The Laws That are the Basis for This Claim**

In order to establish a valid claim, ORS 197.352(1) requires, in part, that a law must restrict the 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 acquired the property.

### **Findings of Fact**

The claim indicates that the claimants desire to develop the 25.27-acre property with a “warehouse and distribution center” that would have been permitted under Lane County’s M-2 industrial zone in effect in 1975 and that land use regulations enacted or adopted after they acquired the property prevent the desired use.<sup>2</sup>

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<sup>2</sup> The claimants cited “all regulations, requirements, statutes or other administrative direction that were enacted after December 2, 1975,” as applicable to this claim, but did not establish how any particular land use regulation applies

The claim is based generally on the applicable provisions of state law that require Exclusive Farm Use (EFU) zoning and restrict uses on EFU-zoned land. The claimants' property is zoned E-40 by Lane County, 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 Goal 3 be zoned EFU pursuant to ORS 215.

The claimants acquired the subject property after the adoption of the statewide planning goals, but before the Commission acknowledged Lane County's land use regulations to be in compliance with the statewide planning goals pursuant to ORS 197.250 and 197.251. At that time, the property was zoned by Lane County as M-2, which allowed specified industrial uses. However, because the Commission had not acknowledged the county's plan and land use regulations when the claimants acquired the subject property on December 2, 1975, the statewide planning goals, and Goal 3 in particular, applied directly to the claimants' property when they acquired it.<sup>4</sup>

Under Goal 3 and the provisions of ORS 215.213 in effect on December 2, 1975, a limited number of non-farm uses were allowed on resource land. However, industrial uses were not permitted on resource land under the provisions of ORS 215.213, in effect and applicable to the subject property in 1975.

### Conclusions

The current zoning requirements and uses permitted under Goal 3, ORS 215 and OAR 660, division 33, do not allow the claimants' desired development of an industrial warehouse and distribution center. However, this desired use was also prohibited under the laws in effect when the claimants acquired the subject property on December 2, 1975. Laws enacted or adopted since the claimants acquired the subject property in 1975 do not restrict the claimants' desired use of the property relative to what was permitted when the claimants acquired it in 1975.

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to the claimants' desired use of the subject property or restricts its use with the effect of reducing its fair market value. This report addresses only those regulations that the department finds are applicable to and restrict the claimants' use of the subject property, based on the claimants' description of their desired use.

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

<sup>4</sup> The statewide planning goals became effective on January 25, 1975, and were applicable to legislative land use decisions and some quasi-judicial land use decisions prior to the Commission's acknowledgment of each county's comprehensive plan and implementing regulations. *Perkins v. City of Rajneeshpuram*, 300 Or 1 (1985); *Alexanderson v. Polk County*, 289 Or 427, rev. den 290 Or 137 (1980); *Sunnyside Neighborhood Assn. v. Clackamas County*, 280 Or 3 (1977); *Jurgenson v. Union County*, 42 Or App 505 (1979); and *1000 Friends of Oregon v. Benton County*, 32 Or App 413 (1978). After the county's plan and land use regulations were acknowledged by the Commission, the statewide planning goals and implementing rules no longer applied directly to such local land use decisions. *Byrd v. Stringer*, 295 Or 311 (1983). However, statutory requirements continue to apply, and insofar as the state and local provisions are materially the same, the local provisions must be interpreted consistent with the substance of the goals and implementing rules. *Forster v. Polk County*, 115 Or App 475 (1992) and *Kenagy v. Benton County*, 115 Or App 131 (1992).

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

In order to establish a valid claim, ORS 197.352(1) requires that the land use regulation(s) (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 \$315,000 as the reduction in the subject property’s fair market value due to the regulations that restrict the claimants’ desired use of the property. This amount is based on a land appraisal report included with the claim.

#### **Conclusions**

As explained in Section V.(1) of this report, the claimants are Don and Cheryl Wobbe who acquired the subject property on December 2, 1975. The claimants have not established their entitlement to compensation under ORS 197.352 because no state laws enacted or adopted since the claimants acquired the subject property restrict the use of the property relative to the uses allowed in 1975. The claimants’ desired use of the subject property for an industrial warehouse and distribution center was prohibited under the laws in effect when the claimants acquired the property in 1975. Therefore, the fair market value of the subject property has not been reduced as a result of land use regulations enforced by the Land Use Conservation and Development Commission (the Commission) or the department since the claimants 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, including applicable provisions of Goal 3, ORS 215 and OAR 660, division 33, which Lane County has implemented through its current EF-40 zone. With the exception of provisions of Goal 3 and ORS 215 in effect in 1975, these land use regulations were enacted or adopted after the claimants acquired the subject property.

#### **Conclusions**

With the exception of provisions of Goal 3 and ORS 215 in effect in 1975, the land use regulations that restrict the claimants’ use of the subject property were enacted or adopted after they acquired the property and therefore, are not exempt under ORS 197.352. However, the laws in effect when the claimants acquired the property, including provisions of Goal 3 and ORS 215 in effect in 1975, are exempt and prohibit the claimants’ desired 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 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 present 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 acquired it in 1975 and do not reduce the fair market value of the property. The claimants' desired use of the property for development of an industrial warehouse and distribution center was prohibited under the provisions of Goal 3 and ORS 215 in effect when the claimants acquired the property in 1975. Those laws in effect in 1975 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 because the claimants' desired use of the subject property as an industrial warehouse and distribution center was prohibited under the laws in effect when they acquired the property in 1975. 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 December 7, 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.