

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. M129692  
(BALLOT MEASURE 37) OF )  
James A. Smejkal, CLAIMANT )

Claimant:     James A. Smejkal (the Claimant)

Property:     Township 5N, Range 3W, Section 1, Tax lot 1200, Columbia County  
(the property)

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

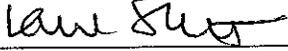
Claimant submitted the Claim to the State of Oregon under ORS 197.352. Under OAR 125-145-0010 *et seq.*, the Department of Administrative Services (DAS) referred the Claim to the Department of Land Conservation and Development (DLCD) as the regulating entity. This order is based on the record herein, including the Findings and Conclusions set forth in the Final Staff Report and Recommendation of DLCD (the DLCD Report) attached to and by this reference incorporated into this order.

ORDER

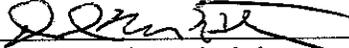
The Claim is denied as to laws administered by DLCD and the Land Conservation and Development Commission (LCDC) for the reasons set forth in the DLCD Report.

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 8<sup>th</sup> day of January, 2007.

FOR THE DEPARTMENT OF  
ADMINISTRATIVE SERVICES:

  
David Hartwig, Administrator  
DAS, State Services Division  
Dated this 8<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 8, 2007

**STATE CLAIM NUMBER:** M129692

**NAME OF CLAIMANT:** James A. Smejkal

**MAILING ADDRESS:** 42142 NW Palace Drive  
Banks, Oregon 97106

**PROPERTY IDENTIFICATION:** Township 5N, Range 3W, Section 1  
Tax lot 1200  
Columbia County

**OTHER CONTACT INFORMATION:** Robert A. Smejkal  
PO Box 654  
Eugene, Oregon 97440

**DATE RECEIVED BY DAS:** July 17, 2006

**180-DAY DEADLINE:** January 13, 2007

**I. SUMMARY OF CLAIM**

The claimant, James Smejkal, seeks compensation in the amount of \$60,000 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 claimant desires compensation or the right to develop a dwelling on the 0.62-acre subject property.<sup>1</sup> The subject property is located at the above coordinates on Janshaw Road, near Vernonia, in Columbia 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 claimant has not established that any state land use regulations enforced by the Land Conservation and

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<sup>1</sup> The claim also indicates that the claimant desires to sell or transfer the newly created parcels for development. In effect, the claimant requests that a decision of the department to "not apply" (waive) certain laws as set forth in this report be transferable with the property. ORS 197.352 only authorizes a state agency to waive a law in order to allow the current owner a use of the property permitted at the time that owner acquired the property. A determination of transferability is beyond the scope of relief that the department may grant under ORS 197.352. The Oregon Department of Justice has advised the department that "[i]f the current owner of the real property conveys the property before a new use allowed by the public entity is established, then the entitlement to relief will be lost."

Development Commission (the Commission) restrict the claimant's desired use of the subject property. (See the complete recommendation in Section VI. of this report.)

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

#### **Comments Received**

On October 13, 2006, pursuant to Oregon Administrative Rule (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 were received in response to the 10-day notice.

The comments are relevant to whether a state law restricts the claimant's use of the subject property, whether the restriction of the claimant's use of the subject property reduces the fair market value of the property and whether the laws that are the basis for the claim are exempt under ORS 197.352(3). The comments have been considered by the department in preparing this report. (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 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 17, 2006, for processing under OAR 125, division 145. The claim identifies Columbia County zoning and other state and county land use regulations generally, 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 claimant, James Smejkal, acquired the subject property as trustee of the Antone Fred Smejkal and Louise Judith Smejkal Irrevocable Trust on January 31, 1995, as reflected by a deed included with the claim.<sup>2</sup> The Columbia County Assessor’s Office confirms the claimant’s current ownership of the subject property.

### **Conclusions**

The claimant, James Smejkal, is an “owner” of the subject property as that term is defined by ORS 197.352(11)(C), as of January 31, 1995.

### **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 develop a dwelling on the subject property, and that county zoning and other land use regulations, generally, prohibit the desired use.<sup>3</sup>

The claim is based on the applicable provisions of state law that regulate rural residential zoning. The claimant’s property is zoned RR-5 by Columbia County, as required by Statewide Planning Goal 14 (Urbanization), because the claimant’s property is “rural residential land,” as defined by Goal 14. Goal 14 became effective on January 25, 1975, and required that land outside urban growth boundaries be used for rural uses.

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<sup>2</sup> It appears that the claimant may have acquired the property from family members. However, the claimant does not assert family ownership or otherwise establish when the Smejkal family acquired the property. Therefore, the department cannot evaluate the claimant’s demand for compensation on the date of family acquisition.

<sup>3</sup> The claimant summarily cites numerous state land use laws as applicable to this claim, but does not establish how the laws either apply to the claimant’s desired use of the subject property or restrict its use with the effect of reducing its fair market value. On their face, most of these regulations either do not apply to the claimant’s property or do not restrict the claimant’s desired use of the property with the effect of reducing its fair market value. This report addresses only those regulations that the department finds could apply to the claimant’s property and his desired use, based on his description of his desired use.

Goal 14 was effective on January 25, 1975, and requires that local comprehensive plans identify and separate urbanizable land from rural land in order to provide for an orderly and efficient transition from rural to urban land use. In 2000, as a result of a 1986 Oregon Supreme Court decision,<sup>4</sup> the Commission amended Goal 14 and adopted OAR 660-004-0040 (Application of Goal 14 to Rural Residential Areas), which was effective on October 4, 2000. Those rules establish the minimum lot or parcel size for new lots or parcels established in a rural residential zone. Those rules do not regulate or restrict the development of dwellings on existing lots or parcels in rural residential zones. Development standards for existing lots or parcels in rural residential zones are regulated by the local jurisdiction in which the rural residentially zoned property is located.

The claimant has not identified any specific state land use regulations that restrict his desired development of a dwelling on the subject property.

### **Conclusions**

The current zoning and minimum lot size requirements and dwelling standards established by Goal 14 and provisions applicable to land outside urban growth boundaries in OAR 660, division 14, were all enacted or adopted after claimant acquired the subject property on January 31, 1995. However these current state land use regulations regulate only the creation of new lots or parcels in rural residential zones. They do not restrict or regulate the claimant's desired development of a dwelling on the subject property. The claimant's desired development is regulated by the local jurisdiction in which the subject property is located. The claimant has not identified or established that any land use regulations enforced by the department or the Commission restrict his desired use of the property.

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

In order to establish a valid claim, ORS 197.352(1) requires that the land use regulations (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."

As explained in Section V.(2) of this report, the claimant, James Smejkal, has not established that any state land use regulations restrict his desired use of the subject property. Therefore, the claimant has not established that any laws enforced by the Commission or the department have had the effect of reducing the property's fair market value.

### **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.

As explained in Section V.(2) of this report, the claimant, James Smejkal, has not established that any state land use regulations restrict his desired use of the subject property. Accordingly, the department cannot determine that any exemptions under ORS 197.352(3) apply to this claim.

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<sup>4</sup> *1000 Friends of Oregon v. LCDC (Curry County)*, 301 Or 447 (1986).

## **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 record before the department, the claimant, James Smejkal, has not established that any state laws enforced by the Commission or the department restrict his desired use of the subject property and have the effect of reducing the property's fair market value.

### **Conclusions**

Based on the record before the department, the claimant, James Smejkal, has not established that he is 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 December 18, 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.