BEFORE THE DEPARTMENT OF ADMINISTRATIVE SERVICES,
THE DEPARTMENT OF LAND CONSERVATION AND DEVELOPMENT OF
THE STATE OF OREGON

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| IN THE MATTER OF THE CLAIM FOR<br>COMPENSATION UNDER ORS 197.352<br>(BALLOT MEASURE 37) OF<br>Bobby Ross, CLAIMANT | )<br>)<br>)<br>) | FINAL ORDER<br>CLAIM NO. M129698 |

Claimant: Bobby Ross (the Claimant)

Property: Township 40, Range 9, Section 1, Tax lot 1200, Klamath 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 9th day of January, 2007.

FOR THE DEPARTMENT OF ADMINISTRATIVE SERVICES:

David Hartwig, Administrator
DAS, State Services Division
Dated this 9th 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 9, 2007

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| **STATE CLAIM NUMBER:** | M129698 |
| **NAME OF CLAIMANT:** | Bobby Ross |
| **MAILING ADDRESS:** | 12140 Highway 39<br>Klamath Falls, Oregon 97603 |
| **PROPERTY IDENTIFICATION:** | Township 40, Range 9, Section 1<br>Tax lot 1200<br>Klamath County |
| **OTHER CONTACT INFORMATION:** | Michael Spencer<br>419 Main Street<br>Klamath Falls, Oregon 97601 |
| **DATE RECEIVED BY DAS:** | July 18, 2006 |
| **180-DAY DEADLINE:** | January 14, 2006 |

## I. SUMMARY OF CLAIM

The claimant, Bobby Ross, seeks compensation in the amount of $701,800 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 divide the 20.72-acre subject property into ten 2-acre parcels and to develop a dwelling on each parcel.[1] The subject property is located at 12140 Highway 39, near Klamath Falls, in Klamath 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 neither the Land Conservation and Development Commission (the Commission) nor the department has enforced laws that restrict the claimant's desired use of the subject property relative to uses

[1] The claimant also requests that the property be rezoned to R-2. This request is beyond the department's authority under ORS 197.352. ORS 197.352 allows the department to compensate or waive regulations enacted or adopted after the claimant acquired the property in order to allow the claimant "a use" of the property permitted at the time he acquired it. It does not eliminate zoning, nor does it authorize the department to change or remove zoning in effect when the claimant acquired the property.

permitted when the claimant acquired the property, and no laws enforced by the Commission or the department have the effect of reducing the property's fair market value.

## III. COMMENTS ON THE CLAIM

### Comments Received

On November 7, 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.

### Findings of Fact

This claim was submitted to DAS on July 18, 2006, for processing under OAR 125, division 145. The claim identifies multiple statutes and regulations, including Statewide Planning Goals 3 (Agricultural Lands), 12 (Transportation) and 14 (Urbanization) and provisions of ORS 215, OAR 660, including division 33, and "any and all state rules and laws enacted after November 30, 1971, except those specifically exempted by Measure 37"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, Bobby Ross, acquired the subject property on October 15, 1973, as reflected by a deed included with the claim.[2] The Klamath County Assessor's Office confirms the claimant's current ownership of the subject property.

### Conclusions

The claimant, Bobby Ross, is an "owner" of the subject property as that term is defined by ORS 197.352(11)(C), as of October 15, 1973.

### 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 property into ten 2-acre parcels and develop a dwelling on each parcel, and that current state and local land use regulations prevent the desired use.[3]

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 claimant's property is zoned by Klamath County as 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.[4] Goal 3 became effective on January 25, 1975, and required that agricultural land as defined by the Goal be zoned EFU pursuant to ORS 215.

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[2] The claimant asserts a July 1973 acquisition date based on an earnest money agreement submitted with the claim. An earnest money agreement does not transfer property and does not establish his ownership of the property. Based on the documentation submitted with the claim, the claimant acquired the property on October 15, 1973, when it was deeded to him.

[3] The claimant summarily lists numerous state land use laws as applicable to this claim, but does not assert or establish how they 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. This report addresses only those regulations that the department finds could be applicable to the claimant's use of the subject property, based on the claimant's description of his desired use.

[4] The claimant's property is "agricultural land" because it contains Natural Resources Conservation Service (NRCS) 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 claimant acquired the subject property on October 15, 1973, after the adoption of Senate Bill 100 (Chapter 80, Oregon Laws 1973) effective on October 5, 1973, but before the adoption of the statewide planning goals, effective on January 25, 1975. At that time, it was zoned by Klamath County as AF-20, which required a minimum of 20-acres for the creation of a new lot or parcel.

During the period between October 5, 1973 and January 25, 1975, ORS 197.175(1) and 197.280 (1973 editions) required, in addition to any local plan or zoning provisions, that cities and counties exercise their planning responsibilities in accordance with the interim land use planning goals set forth in ORS 215.515 (1973 edition). *Petersen v. Klamath Falls*, 279 Or 249 (1977); *see also*, *Meeker v. Board of Comm'rs*, 287 Or 665 (1979) (review of a subdivision is an exercise of planning responsibilities requiring application of the goals); *State Housing Council v. Lake Oswego*, 48 Or App. 525 (1981) (noting that while "[l]and use planning responsibility is not defined in ORS ch 197, the Supreme Court has interpreted that term as including annexation approvals, *subdivision approvals* [emphasis added] and partition approvals") citing *Petersen*, *Meeker* and *Alexanderson v. Polk County*, 285 Or 427 (1980). The claimant's desired use includes subdivision of his land. If the claimant had sought to create that use in 1973, as a matter of law, the use would have been subject to the interim planning goals at ORS 215.515.[5]

[5] The "interim" land use goals are set forth in ORS 215.515(1)(a) to (j) (1973 edition) as follows: (a) "To preserve the quality of the air, water and land resources of the state," (b) "To conserve open space and protect natural and scenic resources," (c) "To provide for the recreational needs of citizens of the state and visitors," (d) "To conserve prime farm lands for the production of crops," (e) "To provide for the orderly and efficient transition from rural to urban land use," (f) "To protect life and property in areas subject to floods, landslides and other natural disasters," (g) "To provide and encourage a safe, convenient and economic transportation system including all modes of transportation: Air, water, rail, highway and mass transit and recognizing differences in the social costs in the various modes of transportation," (h) "To develop a timely, orderly and efficient arrangement of public facilities and services to serve as a framework for urban and rural development," (i) "To diversify and improve the economy of the state" and (j) "To ensure that the development of properties within the state is commensurate with the character and the physical limitations of the land." ORS 215.515 (1973 edition).

The following interim goals are directly applicable to this claim: "To preserve the quality of the air, water and *land* [emphasis added] resources of the state"; "To conserve prime farm lands for the production of crops"; "To provide for the orderly and efficient transition from rural to urban land use"; "To protect life and property in areas subject to floods, landslides and other natural disasters"; "To provide and encourage a safe, convenient and economic transportation system including all modes of transportation: Air, water, rail, highway and mass transit and recognizing differences in the social costs in the various modes of transportation"; and "To develop a timely, orderly and efficient arrangement of public facilities and services to serve as a framework for urban and rural development." ORS 215.515 (1973 edition).

One of the interim goals was to "conserve prime farm lands for the production of crops." Soil types are a determinant of prime farm land. Approximately 79 percent (16 acres) of the soils on the 20.72-acre property are rated as "prime" by the Natural Resource Conservation Service (NRCS).[6]

The claim does not establish that division of the subject property into two acre parcels for residential use complies with the interim planning goals. To the contrary, and in particular, the desired division and development of 16-acres of predominantly "prime," Class I high-value farm land would not "conserve prime farm lands for the production of crops" as required by the interim goals at the time the claimant acquired the subject property in 1973. Moreover, when the claimant acquired the property, it was zoned AF-20, which prohibited the claimant's desired use of the subject property.

**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 since the claimant acquired the subject property in 1973, and do not allow the desired division of the property into parcels less than 80 acres in size or allow the approval of dwellings. However, on October 15, 1973, the "interim" land use goals set forth in ORS 215.515 required the conservation of prime farm land for the production of crops. 79 percent of the claimant's 20.7-acre property is composed of very limited farm land soils rated as "prime." The prime soils portion of the subject property could not be divided for residential use under the "interim" land use goals applicable in 1973. Moreover, the claimant's desired use of the subject property was also prohibited by the AF-20 zoning in effect when he acquired the property on October 15, 1973. The claim does not establish that any state laws enforced by the Commission or the department restrict the claimant's desired use of the subject property relative to uses permitted when the claimant acquired the property on October 15, 1973..

**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."

[6] NRCS soil survey for Klamath County.

**Findings of Fact**

The claim includes an estimate of $701,800 as the reduction in the subject property's fair market value due to the regulations that restrict the claimant's desired use of the property. This amount is based on the claimant's assessment of the value of 2-acre lots in the area.

**Conclusions**

As explained in Section V.(2) of this report, current state land use regulations do not restrict the claimant's desired use of the subject property relative to uses allowed when the claimant acquired the property on October 15, 1973. Land use regulations enacted or adopted by the Commission or the department since the claimant acquired the property do not have the effect of reducing the fair market value of the property relative to uses allowed in October 1973 because the claimant's desired use of the property was prohibited by the interim planning goals and the zoning in effect at the time he 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 Klamath County has implemented through its current EFU zone. With the exception of applicable provisions of ORS 215, including the interim land use planning goals, in effect on October 15, 1973, these state land use regulations were not in effect when the claimant acquired the property.

**Conclusions**

With the exception of provisions of ORS 215 in effect on October 15, 1973, it appears that the general statutory, goal and rule restrictions on the residential division and development of the claimant's property were enacted or adopted since the claimant acquired the property and, therefore, are not exempt under ORS 197.352(3)(E). However, provisions of ORS 215, including the interim planning goals set forth at ORS 215.515 (1973 edition), are exempt and prohibit the claimant's desired use of the prime farm land portion of the subject property. In addition, as discussed in Section V.(2) of this report, these non-exempt laws do not restrict the claimant's desired use of the subject property relative to uses permitted when the claimant acquired the property because the claimant's desired use was prohibited by the zoning in effect when he acquired the property on October 15, 1973.

## 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 current record, the claimant, Bobby Ross, is not entitled to relief under ORS 197.352 as a result of land use regulations enforced by the Commission or the department. The department recommends that this claim be denied because the claimant's desired use of the property was prohibited under the interim planning goals set forth at ORS 215.515 (1973 edition) and the AF-20 zoning in effect when he acquired the property on October 15, 1973. Neither the Commission nor the department has enforced laws enacted or adopted after the claimant acquired the subject property that restrict the claimant's desired use of the property relative to uses permitted when he acquired it. Therefore, no laws enforced by the Commission or the department have the effect of reducing the subject property's fair market value.

## 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.