

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. M129781  
(BALLOT MEASURE 37) OF )  
Carol House, CLAIMANT )

Claimant: Carol House (the Claimant)

Property: Township 35S, Range 1W, Section 24, Tax lots 101 and 102  
Jackson County (the property)

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

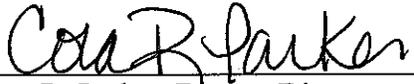
Claimant submitted the Claim to the State of Oregon under ORS 197.352. Under OAR 125-145-0010 *et seq.*, the Department of Administrative Services (DAS) referred the Claim to the Department of Land Conservation and Development (DLCD) as the regulating entity. This order is based on the record herein,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

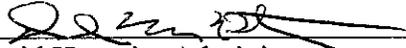
The Claim is denied as to laws administered by DLCD and the Land Conservation and Development Commission (LCDC) for the reasons set forth in the DLCD Report.

This Order is entered by the Deputy 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

  
Cora R. Parker, Deputy Director  
DLCD  
Dated this 24<sup>th</sup> day of January, 2007.

FOR the DEPARTMENT OF  
ADMINISTRATIVE SERVICES:

  
David Hartwig, Administrator  
DAS, State Services Division  
Dated this 24<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 24, 2007

**STATE CLAIM NUMBER:** M129781

**NAME OF CLAIMANT:** Carol House

**MAILING ADDRESS:** 211 Prairie Landing Drive  
Eagle Point, Oregon 97524

**PROPERTY IDENTIFICATION:** Township 35S, Range 1W, Section 24  
Tax lots 101 and 102  
Jackson County

**OTHER CONTACT INFORMATION:** Tamara L. Gledhill  
201 W. Main Street, Suite 5  
Medford, Oregon 97501

**DATE RECEIVED BY DAS:** July 31, 2006

**180-DAY DEADLINE:** January 27, 2007

**I. SUMMARY OF CLAIM**

The claimant, Carol House, seeks compensation in the amount of \$939,160 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 80-acre subject property into four 20-acre parcels and to develop a dwelling on each parcel. The subject property is located near Eagle Point, in Jackson 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 there is no legal access to the property. (See the complete recommendation in Section VI of this report)

**III. COMMENTS ON THE CLAIM**

**Comments Received**

On November 6, 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 is relevant to whether there is legal access to the subject property. The comment has been considered by the department in preparing this report. (See comment letter in the department 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 31, 2006, for processing under OAR 125, division 145. The claim identifies the Statewide Planning Goals, ORS 197, 215.700 through 215.780, Oregon Administrative Rules (OAR) 660-006-0000 through 660-006-0060, and any applicable Jackson County Comprehensive Plan and Development Code sections enacted since July 6, 1978, that prevent the desired use as the basis for the claim (see 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, Carol House, acquired the subject property on July 26, 1978, as reflected by a warranty deed included with the claim. The Jackson County Assessor's Office confirms the claimant's current ownership of the subject property.

## **Conclusions**

The claimant, Carol House, is an "owner" of the subject property, as that term is defined by ORS 197.352(1)(C), as of July 26, 1978.

## **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 80-acre subject property into four 20-acre parcels and to develop a dwelling on each parcel, and that state and local land use regulations prevent the desired use.

The claim is based generally on the applicable provisions of state law that require forest zoning and restrict uses on forest-zoned land. The claimant's property is zoned by Jackson County as Woodland Resource (WR) as required by Goal 4, in accordance with ORS 215 and OAR 660, division 6, because the claimant's property is "forest land" under Goal 4. Goal 4 became effective on January 25, 1975, and requires that forest land 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 and 215.780 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.

The claimant acquired the subject property after the adoption of the statewide planning goals but before the Commission acknowledged Jackson County's land use regulations to be in compliance with the statewide planning goals pursuant to ORS 197.250 and 197.251. Because the Commission had not acknowledged the county's plan and land use regulations when the claimant acquired the subject property on July 6, 1978, the statewide planning goals, and Goal 4 in particular, applied directly to the claimant's property when she acquired it.<sup>1</sup>

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<sup>1</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 land use 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 directly applied to such local land use decisions. *Byrd v. Stringer*, 295 Or 311 (1983).

Goal 4 went into effect on January 25, 1975, and was intended to “conserve forest lands for forest uses” and required, “Lands suitable for forest uses shall be inventoried and designated as forest lands. Existing forest land uses shall be protected unless proposed changes are in conformance with the comprehensive plan.” Those forest uses were defined as follows: “(1) the production of trees and the processing of forest products; (2) open space, buffers from noise, and visual separation of conflicting uses; (3) watershed protection and wildlife and fisheries habitat; (4) soil protection from wind and water; (5) maintenance of clean air and water; (6) outdoor recreational activities and related support services and wilderness values compatible with these uses; and (7) grazing land for livestock.” Specifically, Goal 4 only allowed land divisions that would protect commercial forest lands for commercial forest uses. Dwellings in forest zones could only be allowed if found to be “necessary and accessory” to one of the enumerated forest uses listed in Goal 4.<sup>2</sup>

No information has been presented in the claim to establish that the claimant’s desired division of the 80-acre property into four 20-acre parcels and her development of a dwelling on each parcel comply with the Goal 4 standards in effect when the claimant acquired the subject property in 1978.

However, even if these state land use regulations otherwise restrict the claimant’s desired use, in this case, the claimant has not established that she has any legal access to this property. The department requested documentation or evidence of access from the claimant’s attorney on December 12, 2006. The attorney has not provided any evidence or documentation on access or otherwise responded to the departments’ request for information. Subsection 14 of the title report provided by the claimant supports the finding that the claimant does not have access to the subject property.

Without legal access to the property, the claimant has no right to use the property for the desired use absent the otherwise restricting state land use regulations. Laws enforced by the Commission or the department do not restrict the claimant’s desired use of the subject property relative to what was permitted when the claimant acquired it in 1978 because the claimant has not established that she has legal access to the property and therefore has not established that she could have carried out her desired use when she acquired the property or that she could carry it out now absent the otherwise restricting land use regulations.

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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. *Foster v. Polk County*, 115 Or App 475 (1992); *Kenagy v. Benton County*, 115 Or App 131 (1992).

<sup>2</sup> Goal 4 prohibited uses that were not enumerated by Goal 4 as permissible uses for forest lands as well as those that were not necessary and accessory to an enumerated forest use. *Lamb v. Lane County*, 7 Or LUBA 137 (1983). Dwellings in forest lands were required to be “necessary and accessory” to show that such dwellings complied with the Goal 4 requirement that local land use regulations must “conserve forest lands for forest uses.” *1000 Friends v. LCDC (Curry County)*, 301 Or 447 (1986). A dwelling that may “enhance” forest uses is not “necessary and accessory” to a forest use to the extent required by Goal 4. *1000 Friends of Oregon v. LCDC (Lane County)*, 305 Or 384 (1988). For additional guidance, the Goal 4 provisions were interpreted under OAR 660, division 6, effective on September 1, 1982, in *1000 Friends of Oregon v. LCDC (Lane County)* and in *1000 Friends v. LCDC (Curry County)*.

## **Conclusions**

The current zoning requirements, minimum lot size and dwelling standards established pursuant to Goal 4, ORS 215.705 to 215.755 and 215.780 and OAR 660-006-0026 and 660-006-0027 were all enacted or adopted after the claimant acquired the subject property in 1978 and do not allow the claimant's desired division or development of the property. However, the claimant has not established that she has any legal access to the subject property. As a result, the claimant has no right to carry out the desired division or residential development of the property that can be restricted by land use regulations. Accordingly, the state land use regulations do not restrict the desired use of the subject property relative to uses allowed when the claimant acquired the property with the effect of reducing the property's fair market value.

### **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."

The claim includes an estimate of \$939,160 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 a realtor's assessment of the property.

As established in Section V.(2) above, the claimant has not established that she has any legal access to the subject property. Accordingly, she has not established that she has the legal ability to carry out the desired use absent the state land use regulations that could otherwise restrict her desired use. Without establishing legal access to the property, the claimant has not established that any state land use regulations that could otherwise restrict the desired use have the effect of reducing the property's fair market value. Accordingly, the claimant has not established that she is entitled to compensation under ORS 197.352 as a result of land use regulations that restrict the claimant's use of the subject property and have the effect of reducing its 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.

The claim is based on state land use regulations that restrict the use of the subject property, including applicable provisions of Goal 4, ORS 215 and OAR 660, division 6, which Jackson County has implemented through its current WR zone. With the exception of provisions of Goal 4 adopted before the claimant acquired the subject property in 1978, these state land use regulations were not in effect when the claimant acquired the property.

However, the claimant has not established that she has legal access to the subject property. Accordingly, the claimant has not established that she is entitled to compensation under ORS 197.352. Therefore, the issue of whether any land use regulations are exempt is not relevant to her claim.

## **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 claimant's desired use of the subject property relative to what was permitted when the claimant acquired it in 1978 because the claimant has not established that she has legal access to the property and therefore has not established that she could have carried out her desired use when she acquired the property or that she could carry it out now absent the otherwise restricting land use regulations. Because she has no legal access to the subject property, the claimant has not established that any land use regulations that could otherwise restrict her desired use have the effect of reducing the property's fair market value.

### **Conclusions**

Based on the record and the foregoing findings and conclusions, the claimant has not established that she is entitled to relief under ORS 197.352(1) as a result of land use regulations enforced by the Commission or the department because she has not established that she has any legal access to the property. 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 January 3, 2007. 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.