Oregon
Theodore R. Kulongoski, Governor

**Department of Land Conservation and Development**
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March 26, 2007

To: Interested Persons

From: Lane Shetterly, Director

*Re: Ballot Measure 37 (ORS 197.352) Claim Numbers M130161*

*Claimants:* William "Roger" and Melody Boucock

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Enclosed, in regard to the above-referenced claim for compensation under Ballot Measure 37 (ORS 197.352), is the Final Staff Report and Recommendation of the Department of Land Conservation and Development, and the Final Order.

This Final Staff Report and Recommendation and the Final Order constitute the final decision on this claim. No further action will be taken on this matter.

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>William "Roger" Boucock and<br>Melody Boucock, CLAIMANTS | )<br>)<br>)<br>)<br>) | FINAL ORDER<br>CLAIM NO. M130161 |

Claimants: William "Roger" Boucock and Melody Boucock (the Claimants)

Property: Township 23S, Range 4W, Section 6, Tax lot 403, Douglas 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 approved as to laws administered by DLCD and the Land Conservation and Development Commission (LCDC) for the reasons set forth in the DLCD Report, and subject to the following terms:

1. In lieu of compensation under ORS 197.352, the State of Oregon will not apply the following laws to William and Melody Boucock's division of the 68.78-acre subject property into one 3-acre parcel and one 65.78-acre parcel: applicable provisions of Goals 3 and 4, ORS 215 and OAR 660, divisions 6, and 33, enacted or adopted after each claimant acquired the subject property. These land use regulations will not apply to the claimants only to the extent necessary to allow them to use the subject property for the use described in this report, and only to the extent that use was permitted when William Boucock acquired the property on February 1, 1988, and when Melody Boucock acquired the property on March 14, 1996. The department acknowledges that the relief to which Melody Boucock is entitled under ORS 197.352 will not allow her to use the subject property in the manner set forth in the claim.

2. The action by the State of Oregon provides the state's authorization to the claimants to use the subject property for the use described in this report, subject to the standards in effect when William Boucock acquired the property on February 1, 1988, and when Melody Boucock acquired the property on March 14, 1996. On February 1, 1988, the property was subject to compliance with Goals 3 and 4, and OAR 660, divisions 5, and 6, as implemented through

Douglas County's acknowledged FG and FF zones, and the applicable provisions ORS 215 then in effect. On March 14, 1996, the property was subject to compliance with Goals 3 and 4, and OAR 660, divisions 6, and 33, currently in effect.

3. To the extent that any law, order, deed, agreement or other legally enforceable public or private requirement provides that the subject property may not be used without a permit, license or other form of authorization or consent, the order will not authorize the use of the property unless the claimants first obtain that permit, license or other form of authorization or consent. Such requirements may include, but are not limited to: a building permit, a land use decision, a "permit" as defined in ORS 215.402 or 227.160, other permits or authorizations from local, state or federal agencies and restrictions on the use of the subject property imposed by private parties.

4. Any use of the property by the claimants under the terms of the order will remain subject to the following laws: (a) those laws not specified in (1) above; (b) any laws enacted or enforced by a public entity other than the Commission or the department; and (c) those laws not subject to ORS 197.352 including, without limitation, those laws exempted under ORS 197.352(3).

5. Without limiting the generality of the foregoing terms and conditions, in order for the claimants to use the subject property, it may be necessary for them to obtain a decision under ORS 197.352 from a city and/or county and/or metropolitan service district that enforces land use regulations applicable to the property. Nothing in this order relieves the claimants from the necessity of obtaining a decision under ORS 197.352 from a local public entity that has jurisdiction to enforce a land use regulation applicable to a use of the subject property by them.

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 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 125, division 145, and ORS 293.

FOR DLCD AND THE LAND CONSERVATION AND DEVELOPMENT COMMISSION:
Lane Shetterly, Director

Cora R. Parker

Cora R. Parker, Deputy Director
DLCD
Dated this 26th day of March, 2007.

FOR the DEPARTMENT OF ADMINISTRATIVE SERVICES:

David Hartwig, Administrator
DAS, State Services Division
Dated this 26th day of March, 2007.

## NOTICE OF RIGHT TO APPEAL OR OTHER JUDICIAL RELIEF

You are entitled, or may be entitled, to judicial remedies including the following:

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)

## FOR INFORMATION ONLY

The Oregon Department of Justice has advised the Department of Land Conservation and Development that "[i]f the current owner of the real property conveys the property before the new use allowed by the public entity is established, then the entitlement to relief will be lost."

## ORS 197.352 (BALLOT MEASURE 37) CLAIM FOR COMPENSATION

## OREGON DEPARTMENT OF LAND CONSERVATION AND DEVELOPMENT
**Final Staff Report and Recommendation**

March 26, 2007

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| **STATE CLAIM NUMBER:** | M130161 |
| **NAMES OF CLAIMANTS:** | William "Roger" Boucock<br>Melody Boucock |
| **MAILING ADDRESS:** | 4575 Elkhead Road<br>Yoncalla, Oregon 97499 |
| **PROPERTY IDENTIFICATION:** | Township 23S, Range 4W, Section 6<br>Tax lot 403<br>Douglas County |
| **DATE RECEIVED BY DAS:** | October 2, 2006 |
| **180-DAY DEADLINE:** | March 31, 2007 |

## I. SUMMARY OF CLAIM

The claimants, William and Melody Boucock, seek compensation in the amount of $290,000 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 divide the 68.78-acre subject property into one 3-acre parcel and one 65.78-acre parcel. The subject property is located at 4545 Elkhead Road, near Yoncalla, in Douglas 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 this claim is valid. Department staff recommends that, in lieu of compensation, the requirements of the following state laws enforced by the Land Conservation and Development Commission (the Commission) or the department not apply to William and Melody Boucock's division of the 68.78-acre subject property into one 3-acre parcel and one 65.78-acre parcel: applicable provisions of Statewide Planning Goals 3 (Agricultural Lands) and 4 (Forest Lands), ORS 215 and Oregon Administrative Rules (OAR) 660, divisions 6, and 33, enacted or adopted after each claimant acquired the subject property. These land use regulations will not apply to the claimants only to the extent necessary to allow them to use the subject property for the use described in this report, and only to the extent that use was permitted when William Boucock acquired the property on February 1, 1988, and when Melody Boucock acquired on the property on March 14, 1996. The department acknowledges that the relief to which Melody Boucock is entitled under ORS 197.352 will not

allow her to use the subject property in the manner set forth in the claim. (See the complete recommendation in Section VI. of this report.)

## III. COMMENTS ON THE CLAIM

**Comments Received**

On January 24, 2007, 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, 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 October 2, 2006, for processing under OAR 125, division 145. The claim identifies provisions of ORS 215 and OAR 660 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**

Claimant William Boucock acquired the subject property on February 1, 1988, as reflected by a warranty deed included with the claim. William Boucock conveyed an interest in the property to his wife, claimant Melody Boucock, on March 14, 1996, as reflected by a deed creating estate by the entirety included with the claim. The Douglas County Assessor's Office confirms the claimants' current ownership of the subject property.

**Conclusions**

The claimants, William and Melody Boucock, are "owners" of the subject property as that term is defined by ORS 197.352(11)(C). William Boucock has been an owner since February 1, 1988. Melody Boucock has been an owner since March 14, 1996. William Boucock is a "family member" of Melody Boucock as that term is defined by ORS 197.352(11)(A).

**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 desire to divide the 68.78-acre subject property into one 3-acre parcel and one 65.78-acre parcel, and that the use is not allowed under current land use regulations.

The claim is based generally on the applicable provisions of state law that require Exclusive Farm Use (EFU) zoning and forest land zoning. The claimants' property is zoned EFU – Grazing (FG) and Farm Forest (FF) by Douglas County.

The northern approximately three-quarters of the subject property is zoned FG, as required by Goal 3, in accordance with ORS 215 and OAR 660, division 33, because this portion of the claimants' property is "agricultural land" as defined by Goal 3.[1] 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.

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. 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.

[1] The northern approximately three-quarters of the subject property is "agricultural land" because this portion contains Natural Resources Conservation Service Class I–IV soils.

The southern approximately one-quarter of the claimants' property is zoned FF, which is a mixed agricultural and forest land zone, as provided for by Goal 4 and the implementing provisions of OAR 660, division 6 (effective on February 5, 1990), subsequently amended on March 1, 1994, to comply with the provisions of House Bill 3661 (Chapter 792, Oregon Laws 1993).

For land divisions, OAR 660-006-0055 authorizes the creation of new parcels based on the standards applicable to farm or forest zones that implement the minimum lot size specified in ORS 215.780. Under ORS 215.780(2)(a), the minimum lot size in Douglas County's FF zone is 80 acres. ORS 215.780 became effective on November 4, 1993 (Chapter 792, Oregon Laws 1993).

At the time William Boucock acquired the subject property, it was subject to Douglas County's acknowledged EFU and FF zones.[2] When William Boucock acquired the property, the claimants' desired use of the property would have been governed by the county's acknowledged EFU and FF zones and the applicable provisions of Goals 3 and 4, ORS 215 and OAR 660, divisions 5, and 6, then in effect.[3]

In 1988, ORS 215.263 (1987 edition) required that divisions of land in EFU zones be "appropriate for the continuation of the existing commercial agricultural enterprise within the area" or not smaller than the minimum size in the county's acknowledged plan.

The claim does not establish whether or to what extent the claimants' desired division of the subject property was allowed under the standards in effect when William Boucock acquired the property on February 1, 1988.

**Conclusions**

The current zoning requirements and minimum lot size established pursuant to Goal 3 for agricultural land and Goal 4 for lands zoned for mixed farm-forest use and the statutory and rule restrictions under applicable provisions of ORS 215 and OAR 660, divisions 6, and 33, were enacted or adopted after William Boucock acquired the subject property in 1988, and do not allow his desired division of the property. However, the claim does not establish whether or to what extent William Boucock's desired use of the subject property complies with the standards for land division under Goals 3 and 4 and OAR 660, divisions 5, and 6, as implemented through Douglas County's acknowledged comprehensive plan and zoning regulations and the applicable provisions of ORS 215 in effect when he acquired the property on February 1, 1988.

This report addresses only those state laws that are identified in the claim, or that the department is certain apply to the subject property based on the use that the claimants have identified. There may be other laws that currently apply to the claimants' use of the subject property, and that may

[2] Douglas County's FG zone was acknowledged by the Commission for compliance with Goal 3 on December 24, 1985, and its FF zone was acknowledged by the Commission for compliance with Goal 4 on January 18, 1983.
[3] After the county's comprehensive plan and land use regulations were acknowledged by the Commission as complying with the statewide planning goals, the goals and implementing rules no longer applied directly to individual 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).

continue to apply to the use of the property, that have not been identified in the claim. In some cases, it will not be possible to know which laws apply to a use of the subject property until there is a specific proposal for that use. When the claimants seek a building or development permit to carry out a specific use, it may become evident that other state laws apply to that use.

**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 $290,000 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 realtor's comparative market analysis submitted with the claim.

**Conclusions**

As explained in Section V.(1) of this report, the claimants are William Boucock who acquired the subject property in 1988 and his wife, Melody Boucock. Under ORS 197.352, the claimants are due compensation for land use regulations that restrict the use of the subject property and have the effect of reducing its fair market value. Based on the findings and conclusions in Section V.(2) of this report, laws enacted or adopted since William Boucock acquired the subject property restrict the claimants' desired use of the property. The claimants estimate that the effect of the regulations on the fair market value of the subject property is a reduction of $290,000.

Without an appraisal or other documentation and without verification of whether or the extent to which the claimants' desired use of the subject property was allowed under the standards in effect when the claimants acquired the property, it is not possible to substantiate the specific dollar amount by which the land use regulations have reduced the fair market value of the property. Nevertheless, based on the evidence in the record for this claim, the department determines that the fair market value of the subject property has been reduced to some extent as a result of land use regulations enforced by the Commission or the department since William Boucock 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 Goals 3 and 4, ORS 215 and OAR 660, divisions 6, and 33, which Douglas County has implemented through its current FG and FF zones. With the exception of amendments enacted or adopted after February 1, 1988, these state land use regulations were in effect when William Boucock acquired the property.

**Conclusions**

Without a specific development proposal for the subject property, it is not possible for the department to determine all the laws that may apply to a particular use of the property, or whether those laws may fall under one or more of the exemptions under ORS 197.352. It appears that the general statutory, goal and rule restrictions on division of the subject property are not exempt under ORS 197.352(3)(E) only to the extent they were enacted or adopted after William Boucock acquired the property on February 1, 1988. Provisions of Goals 3 and 4, ORS 215 and OAR 660 in effect when William Boucock acquired the subject property on February 1, 1988, are exempt under ORS 197.352(3)(E) and do not provide a basis for compensation. In addition, laws enacted or adopted for a purpose set forth in ORS 197.352(3)(A) to (D) are also exempt and would not provide a basis for compensation.

## 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 restrict the claimants' desired use of the subject property. The claim asserts that existing state land use regulations enforced by the Commission or the department have the effect of reducing the fair market value of the subject property by $290,000. However, because the claim does not provide an appraisal or other relevant evidence demonstrating that the land use regulations described in Section V.(2) reduce the fair market value of the subject property, a specific amount of compensation cannot be determined. In order to determine a specific amount of the compensation due for this claim, it would also be necessary to verify whether or the extent to which the claimants' desired use of the subject property was allowed under the standards in effect when William Boucock acquired the property. Nevertheless, based on the record for this claim, the department has determined that the laws on which the claim is based have reduced the fair market value of the subject property to some extent.

No funds have been appropriated at this time for the payment of claims. In lieu of payment of compensation, ORS 197.352 authorizes the department to modify, remove or not apply all or parts of certain land use regulations to allow William Boucock to use the subject property for a use permitted when he acquired the property on February 1, 1988, and to allow Melody Boucock to use the property for a use permitted when she acquired the property on March 14, 1996.
At the time Melody Boucock acquired an interest in the subject property, it was zoned FG and FF by Douglas County and subject to the current lot size and dwelling standards under Goals 3

and 4, ORS 215 and OAR 660, divisions 6, and 33, and as described in Section V.(2) of this report.

In addition to the applicable provisions of Goals 3 and 4, ORS 215 and OAR 660, divisions 6, and 33, in effect when Melody Boucock acquired the property on May 14, 1996, and other laws in effect when either claimant acquired the subject property, there may be other laws that apply to the claimants' use of the property that have not been identified in the claim. The department notes that ORS 215.730 and OAR 660, division 6, particularly including OAR 660-006-0029, specify standards for siting dwellings in forest zones. These provisions include fire protection standards for dwellings and for surrounding forest lands. ORS 197.352(3)(B) specifically exempts regulations "restricting or prohibiting activities for the protection of public health and safety, such as fire and building codes. . . ." To the extent they are applicable to the claimants' property, the siting standards for dwellings in forest zones in ORS 215.730 and OAR 660, division 6, are exempt under ORS 197.352(3)(B).

In some cases, it will not be possible to know which laws apply to a use of the subject property until there is a specific proposal for that use. When the claimants seek a building or development permit to carry out a specific use, it may become evident that other state laws apply to that use, and depending on when they were enacted or adopted, may continue to apply to the claimants' property. In addition, some of these laws may be exempt under ORS 197.352(3)(A) to (D) and will continue to apply to the subject property on that basis.

This report addresses only those state laws that are identified in the claim, or that the department is certain apply to the subject property based on the use that the claimants have identified. Similarly, this report only addresses the exemptions provided for under ORS 197.352(3) that are clearly applicable given the information provided to the department in the claim. The claimants should be aware that the less information they have provided to the department in their claim, the greater the possibility that there may be additional laws that will later be determined to continue to apply to their use of the subject property.

**Conclusions**

Based on the record, the department recommends that the claim be approved, subject to the following terms:

1. In lieu of compensation under ORS 197.352, the State of Oregon will not apply the following laws to William and Melody Boucock's division of the 68.78-acre subject property into one 3-acre parcel and one 65.78-acre parcel: applicable provisions of Goals 3 and 4, ORS 215 and OAR 660, divisions 6, and 33, enacted or adopted after each claimant acquired the subject property. These land use regulations will not apply to the claimants only to the extent necessary to allow them to use the subject property for the use described in this report, and only to the extent that use was permitted when William Boucock acquired the property on February 1, 1988, and when Melody Boucock acquired the property on March 14, 1996. The department acknowledges that the relief to which Melody Boucock is entitled under ORS 197.352 will not allow her to use the subject property in the manner set forth in the claim.

2. The action by the State of Oregon provides the state's authorization to the claimants to use the subject property for the use described in this report, subject to the standards in effect when

William Boucock acquired the property on February 1, 1988, and when Melody Boucock acquired the property on March 14, 1996. On February 1, 1988, the property was subject to compliance with Goals 3 and 4, and OAR 660, divisions 5, and 6, as implemented through Douglas County's acknowledged FG and FF zones, and the applicable provisions ORS 215 then in effect. On March 14, 1996, the property was subject to compliance with Goals 3 and 4, and OAR 660, divisions 6, and 33, currently in effect.

3. To the extent that any law, order, deed, agreement or other legally enforceable public or private requirement provides that the subject property may not be used without a permit, license or other form of authorization or consent, the order will not authorize the use of the property unless the claimants first obtain that permit, license or other form of authorization or consent. Such requirements may include, but are not limited to: a building permit, a land use decision, a "permit" as defined in ORS 215.402 or 227.160, other permits or authorizations from local, state or federal agencies and restrictions on the use of the subject property imposed by private parties.

4. Any use of the property by the claimants under the terms of the order will remain subject to the following laws: (a) those laws not specified in (1) above; (b) any laws enacted or enforced by a public entity other than the Commission or the department; and (c) those laws not subject to ORS 197.352 including, without limitation, those laws exempted under ORS 197.352(3).

5. Without limiting the generality of the foregoing terms and conditions, in order for the claimants to use the subject property, it may be necessary for them to obtain a decision under ORS 197.352 from a city and/or county and/or metropolitan service district that enforces land use regulations applicable to the property. Nothing in this order relieves the claimants from the necessity of obtaining a decision under ORS 197.352 from a local public entity that has jurisdiction to enforce a land use regulation applicable to a use of the subject property by them.

## VII. COMMENTS ON THE DRAFT STAFF REPORT

The department issued its draft staff report on this claim on March 6, 2007. 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.