



# Oregon

Theodore R. Kulongoski, Governor

## Department of Land Conservation and Development

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Web Address: <http://www.oregon.gov/LCD>

April 5, 2007

To: Interested Persons

From: Lane Shetterly, Director



*Re: Ballot Measure 37 (ORS 197.352) Claim Number M130282*

*Claimants: Orville T. and Grace G. Cade*

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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

IN THE MATTER OF THE CLAIM FOR ) FINAL ORDER  
COMPENSATION UNDER ORS 197.352 ) CLAIM NO. M130282  
(BALLOT MEASURE 37) OF )  
Orvall T. Cade, CLAIMANT )

Claimant: Orvall T. Cade (the Claimant)

Property: Township 3S, Range 2E, Section 19, Tax lot 1000, Clackamas 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 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 Orvall and Grace Cade's division of tax lot 1000 and Orvall Cade's division of tax lot 1001 into one-acre parcels or to their development of a dwelling on each parcel: applicable provisions of Goal 3, ORS 215 and OAR 660, division 33, enacted or adopted after each claimant acquired the subject tax lots. These land use regulations will not apply to the claimants only to the extent necessary to allow Orvall Cade to use tax lots 1000 and 1001 and Grace Cade to use tax lot 1000 for the use described in this report, and only to the extent that use was permitted when Orvall Cade acquired tax lots 1000 and 1001 on January 6, 1969, and when Grace Cade acquired tax lot 1000 on August 12, 1991. The department acknowledges that the relief to which Grace Cade is entitled under ORS 197.352 may not allow her to use tax lot 1000 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 tax lots for the use described in this report, subject to the standards in effect when Orvall Cade acquired tax lots 1000 and 1001 on January 6, 1969, and when Grace Cade acquired

tax lot 1000 on August 12, 1991. On August 12, 1991, tax lot 1000 was subject to compliance with Goal 3 and OAR 660, division 5, as implemented by Clackamas County's acknowledged EFU zone, and the applicable provisions ORS 215 then in effect.

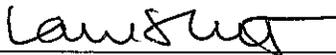
3. To the extent that any law, order, deed, agreement or other legally enforceable public or private requirement provides that tax lots 1000 and 1001 may not be used without a permit, license or other form of authorization or consent, the order will not authorize the use of the property unless the claimants 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 tax lots 1000 and 1001 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 tax lots 1000 and 1001, 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 tax lots 1000 and 1001 by the claimants.

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 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.

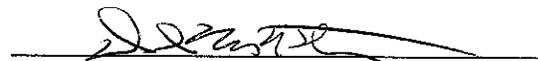
FOR DLCD AND THE LAND  
CONSERVATION AND  
DEVELOPMENT COMMISSION:



Lane Shetterly, Director  
DLCD

Dated this 5<sup>th</sup> day of April, 2007.

FOR the DEPARTMENT OF  
ADMINISTRATIVE SERVICES:



David Hartwig, Administrator  
DAS, State Services Division

Dated this 5<sup>th</sup> day of April, 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.”

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. M130282  
(BALLOT MEASURE 37) OF )  
Orvall T. Cade and Grace G. Cade, CLAIMANTS )

Claimants: Orvall T. Cade and Grace G. Cade (the Claimants)

Property: Township 3S, Range 2E, Section 19, Tax lot 1001, Clackamas 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 Orvall and Grace Cade's division of tax lot 1000 and Orvall Cade's division of tax lot 1001 into one-acre parcels or to their development of a dwelling on each parcel: applicable provisions of Goal 3, ORS 215 and OAR 660, division 33, enacted or adopted after each claimant acquired the subject tax lots. These land use regulations will not apply to the claimants only to the extent necessary to allow Orvall Cade to use tax lots 1000 and 1001 and Grace Cade to use tax lot 1000 for the use described in this report, and only to the extent that use was permitted when Orvall Cade acquired tax lots 1000 and 1001 on January 6, 1969, and when Grace Cade acquired tax lot 1000 on August 12, 1991. The department acknowledges that the relief to which Grace Cade is entitled under ORS 197.352 may not allow her to use tax lot 1000 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 tax lots for the use described in this report, subject to the standards in effect when Orvall Cade acquired tax lots 1000 and 1001 on January 6, 1969, and when Grace Cade acquired

tax lot 1000 on August 12, 1991. On August 12, 1991, tax lot 1000 was subject to compliance with Goal 3 and OAR 660, division 5, as implemented by Clackamas County's acknowledged EFU zone, and the applicable provisions ORS 215 then in effect.

3. To the extent that any law, order, deed, agreement or other legally enforceable public or private requirement provides that tax lots 1000 and 1001 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 tax lots 1000 and 1001 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).

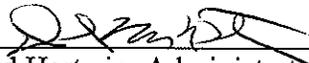
5. Without limiting the generality of the foregoing terms and conditions, in order for the claimants to use tax lots 1000 and 1001, it may be necessary for them to obtain a decision under ORS 197.352 from a city and/or county and/or metropolitan service district that enforces land use regulations applicable 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 tax lots 1000 and 1001 by the claimants.

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 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  
DLCD  
Dated this 5<sup>th</sup> day of April, 2007.

FOR the DEPARTMENT OF  
ADMINISTRATIVE SERVICES:

  
David Hartwig, Administrator  
DAS, State Services Division  
Dated this 5<sup>th</sup> day of April, 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.”

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. M130282  
(BALLOT MEASURE 37) OF )  
Grace G. Cade, CLAIMANT )

Claimant: Grace G. Cade (the Claimant)

Property: Township 3S, Range 2E, Section 19, Tax lot 1000, Clackamas 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

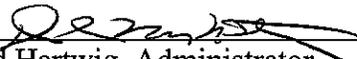
The Claim is denied as to laws administered by DLCD and the Land Conservation and Development Commission (LCDC) for the reasons set forth in the DLCD Report.

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:

  
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DLCD  
Dated this 5<sup>th</sup> day of April, 2007.

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ADMINISTRATIVE SERVICES:

  
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DAS, State Services Division  
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IN THE MATTER OF THE CLAIM FOR ) FINAL ORDER  
COMPENSATION UNDER ORS 197.352 ) CLAIM NO. M130282  
(BALLOT MEASURE 37) OF )  
Orvall T. Cade and Grace G. Cade, CLAIMANTS )

Claimants: Orvall T. Cade and Grace G. Cade (the Claimants)

Property: Township 3S, Range 2E, Section 19, Tax lots 900 and 903,  
Clackamas 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

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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.

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(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**

April 5, 2007

**STATE CLAIM NUMBER:** M130282

**NAMES OF CLAIMANTS:** Orvall T. Cade  
Grace G. Cade

**MAILING ADDRESS:** 12753 South New Era Road  
Oregon City, Oregon 97045

**PROPERTY IDENTIFICATION:** Township 3S, Range 2E, Section 19  
Tax lots 900, 903, 1000 and 1001  
Clackamas County

**OTHER CONTACT INFORMATION:** Don Bowerman  
PO Box 100  
Oregon City, Oregon 97045

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

**180-DAY DEADLINE:** April 11, 2007

**I. SUMMARY OF CLAIM**

The claimants, Orvall and Grace Cade, seek compensation in the amount of \$7,828,668 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 89.7-acre subject property into one-acre parcels and to develop a dwelling on each parcel.<sup>1</sup> The subject property is located at 12753 South New Era Road, near Oregon City, in Clackamas 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 valid in part. 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 Orvall and Grace Cade's division of tax lot 1000 and Orvall Cade's division of tax lot 1001 into one-acre parcels and to their development of a dwelling on each parcel: applicable

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<sup>1</sup> The subject property includes four tax lots. Tax lot 900 consists of 8.84 acres; tax lot 903 consists of 0.93 acre; tax lot 1000 consists of 39.33 acres; and tax lot 1001 consists of 40.6 acres.

provisions of Statewide Planning Goal 3 (Agricultural Lands), ORS 215 and Oregon Administrative Rules (OAR) 660, division 33, enacted or adopted after each claimant acquired the subject tax lots. These land use regulations will not apply to the claimants only to the extent necessary to allow Orvall Cade to use tax lots 1000 and 1001 and to allow Grace Cade to use tax lot 1000 for the use described in this report, and only to the extent that use was permitted when Orvall Cade acquired tax lots 1000 and 1001 on January 6, 1969, and when Grace Cade acquired tax lot 1000 on August 12, 1991. The department acknowledges that the relief to which Grace Cade is entitled under ORS 197.352 may not allow her to use tax lot 1000 in the manner set forth in the claim.

The department has further determined that the claim is not valid as to Orvall Cade for tax lots 900 and 903 because neither the Commission, nor the department, has enforced laws that restrict his use of the subject real property relative to uses permitted when he acquired tax lots 900 and 903 on August 10, 1981, with the effect of reducing the property's fair market value. The claim is not valid as to Grace Cade for tax lots 900, 903 and 1001 because she is not an owner of these tax lots. (See the complete recommendation in Section VI. of this report.)

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

#### **Comments Received**

On February 16, 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 13, 2006, for processing under OAR 125, division 145. The claim identifies Senate Bill 100; House Bill 3661; ORS 215; OAR 660; and "zoning and regulations restricting use or development subsequent to the date(s) of acquisition by claimant(s)" 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 Orvall Cade acquired tax lots 1000 and 1001 on January 6, 1969, as reflected by a warranty deed included with the claim. On August 10, 1981, Orvall Cade acquired tax lots 900 and 903, as reflected by a contract of sale included with the claim. Claimant Grace Cade acquired an interest in tax lot 1000 from her husband, Orvall Cade, on August 12, 1991, as evidenced by a warranty deed included with the claim.<sup>2</sup> The Clackamas County Assessor’s Office confirms Orvall Cade’s current ownership of the subject property and Grace Cade’s current ownership of tax lot 1000.

### **Conclusions**

Claimant Orvall Cade is an “owner” of the subject property as that term is defined by ORS 197.352(11)(C), as of January 6, 1969, for tax lots 1000 and 1001 and as of August 10, 1981, for tax lots 900 and 903. Claimant Grace Cade is an “owner” of tax lot 1000 as that term is defined by ORS 197.352(11)(C), as of August 12, 1991. Grace Cade is not an “owner” of tax lots 900, 903 and 1001 as that term is defined in ORS 197.352(11)(C). Orvall Cade is a “family member” of Grace Cade as that term is defined by ORS 197.352(11)(A) for tax lot 1000.

### **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.

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<sup>2</sup> The claimants assert that Grace Cade acquired the subject property on the same dates as her husband, Orvall Cade; however, marriage does not create a real property ownership interest. The claimants have not submitted documentation to show that Grace Cade has acquired an ownership interest in tax lots 900, 903 and 1001.

## **Findings of Fact**

The claim indicates that the claimants desire to divide the 89.7-acre subject property into one-acre parcels and to develop a dwelling on each parcel, and that the use is not allowed under current land use regulations.<sup>3</sup>

The claim is based generally on the applicable provisions of state law that require Exclusive Farm Use (EFU) zoning and rural residential zoning and restrict uses on EFU- and rural residential-zoned lands.

Tax lots 1000 and 1001 are zoned EFU by Clackamas County as required by Goal 3, in accordance with ORS 215 and OAR 660, division 33, because these tax lots are "agricultural land" as defined by Goal 3.<sup>4</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.

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 the development of dwellings on existing or any proposed parcel 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 became effective on May 22, 2002. (See administrative rule history for OAR 660-033-0100, -0130 and -0135.)

Orvall Cade acquired tax lots 1000 and 1001 in 1969, prior to the adoption of the statewide planning goals and their implementing statutes and regulations. No county zoning applied to those tax lots in 1969.

Tax lots 900 and 903 are zoned FF-10 by Clackamas County. The FF-10 zone is consistent with Goal 14, which generally requires that land outside of urban growth boundaries be used for rural

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<sup>3</sup> The claimants summarily list numerous state land use laws as applicable to this claim, but do not establish how the laws either apply to the claimants' desired use of the subject property or restrict its use with the effect of reducing its fair market value. On their face, most of the regulations either do not apply to the subject property or do not restrict the use of the property with the effect of reducing its fair market value. Without any explanation of how these land use regulations apply to the claimants' desired use of the property, the department cannot evaluate how or whether they apply. This report addresses only those regulations that the department finds are applicable to and restrict the claimants' desired use of the subject property, based on the claimants' description of their desired use.

<sup>4</sup> The subject property is "agricultural land" because it contains National Resources Conservation Service Class I-IV soils.

uses. Clackamas County's FF-10 zone was adopted on January 14, 1980, and requires a minimum of 10 acres for the creation of a new lot or parcel.

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>5</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.

The rule states that if a county rural residential zone in effect on October 4, 2000, specifies a minimum lot size of two acres or more, the area of any new lot or parcel shall equal or exceed the minimum lot size that is already in effect (OAR 660-004-0040(7)(c)). Some relief from this provision is available for lots or parcels having more than one permanent habitable dwelling pursuant to OAR 660-004-0040(7)(h). The rule also provides that a county's minimum lot size requirement in a rural residential zone shall not be amended to allow a smaller minimum lot size without approval of an exception to Goal 14 (OAR 660-004-0040(6)). Because Clackamas County's rural residential zone was in effect on October 4, 2000, and requires a minimum lot size of 10 acres, the minimum lot size for any new lot or parcel must equal or exceed 10 acres.

Orvall Cade acquired tax lots 900 and 903 after the adoption of the statewide planning goals, but before the Commission acknowledged Clackamas County's land use regulations to be in compliance with statewide planning goals pursuant to ORS 197.250 and 197.251. At that time, tax lots 900 and 903 were zoned by Clackamas County as FF-10, which established a 10-acre minimum for new lots or parcels. However, because the Commission had not acknowledged Clackamas County's plan and land use regulations when he acquired tax lots 900 and 903, these tax lots were recognized as resource land when Orvall Cade acquired them in 1981, and the statewide planning goals, and particularly Goals 3 (Agricultural Lands) and 4 (Forest Lands), in addition to Goal 14, would have applied directly to tax lots 900 and 903 had Orvall Cade sought the desired use at the time he acquired these tax lots.<sup>6</sup> Alternatively, Orvall Cade would have been required to establish a basis for an exception to compliance with those goals pursuant to the Goal 2 (Land Use Planning) exceptions process. Through the county's acknowledgement process, tax lot 900 and 903 were ultimately acknowledged as exceptions land pursuant to Goal 2, and zoned by the county for rural residential use, with a 10-acre minimum lot or parcel size. Therefore, while the county could now require that tax lots 900 and 903 be evaluated as resource land, as would have been required in 1981, because of their ultimate designation as

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<sup>5</sup> *1000 Friends of Oregon v. LCDC (Curry County)*, 301 Or 447 (1986).

<sup>6</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 569 (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). 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).

rural residential, FF-10 exceptions land, the county could also require that Orvall Cade's desired use of tax lots 900 and 903 be subject to compliance directly with Goal 14.

The claim does not establish that Orvall Cade's desired division to create one-acre parcels from tax lots 900 and 903 would have been allowed at the time he acquired these tax lots in 1981. To the contrary, Orvall Cade's desired use would not have been permitted under either the county zoning or the statewide planning goals, in effect and applicable to tax lots 900 and 903 when he acquired them.

### **Conclusions**

The current zoning requirements, minimum lot size and dwelling standards established by applicable provisions of Goals 3 and 14, ORS 215 and OAR 660-004-0040 and 660, division 33, were enacted or adopted after Orvall Cade acquired tax lots 1000 and 1001 in 1969 and tax lots 900 and 903 in 1981 and do not allow the desired division or development of the property. However, when Orvall Cade acquired tax lots 900 and 903 in 1981, the statewide planning goals, and in particular, the general requirements of Goal 14, applied directly to the tax lots. The claim does not establish that any state laws enforced by the Commission or the department restrict Orvall Cade's desired use of tax lots 900 and 903 relative to uses permitted when he acquired them in 1981.

As explained in Section V.(1), Grace Cade is not an "owner" of tax lots 900, 903 and 1001 as that term is defined in ORS 197.352(11)(C). Therefore, no laws enforced by the Commission or the department restrict her use of those tax lots with the effect of reducing their fair market value.

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 use of tax lots 1000 and 1001, and that may continue to apply to the claimants' 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 \$7,828,668 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 the claimants' comparison of similar properties in the surrounding area.

## **Conclusions**

As explained in Section V.(1) of this report, the claimants are Orvall Cade who acquired tax lots 1000 and 1001 in 1969 and tax lots 900 and 903 in 1981 and his wife, Grace Cade. As explained in Section V.(1) of this report, Grace Cade is not an "owner" of tax lots 900, 903 and 1001 as that term is defined in ORS 197.352(11)(C). Therefore, Grace Cade is not entitled to compensation under ORS 197.352 for tax lots 900, 903 and 1001 because no laws restrict her use of these tax lots with the effect of reducing their fair market value. Orvall Cade has also not established his entitlement to compensation under ORS 197.352 for tax lots 900 and 903 because his desired use of these tax lots was prohibited under the laws in effect at the time he acquired them. Accordingly, state land use regulations enacted or adopted by the Commission or the department since Orvall Cade acquired tax lots 900 and 903 do not have the effect of reducing their fair market value relative to uses allowed in 1981.

Under ORS 197.352, the claimants are due compensation for land use regulations that restrict the use of tax lots 1000 and 1001 and have the effect of reducing the fair market value. Based on the findings and conclusions in Section V.(2) of this report, laws enacted or adopted since Orvall Cade acquired tax lots 1000 and 1001 restrict the desired use of these tax lots. The claimants estimate that the effect of the regulations on the fair market value of the subject property is a reduction of \$7,828,668.

Without an appraisal or other documentation, it is not possible to substantiate the specific dollar amount by which the land use regulations have reduced the fair market value of the subject property. Nevertheless, based on the evidence in the record for this claim, the department determines that the fair market value of tax lots 1000 and 1001 has been reduced to some extent as a result of land use regulations enforced by the Commission or the department.

## **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 14, ORS 215 and OAR 660-004-0040 and 660, division 33, which Clackamas County has implemented through its current EFU and FF-10 zoning. With the exception of provisions of Goal 14, adopted before Orvall Cade acquired tax lots 900 and 903 on August 10, 1981, these state land use regulations were not in effect when Orvall Cade acquired the subject 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. With the exception of Goal 14 in effect when Orvall Cade acquired tax lots 900 and 903, it appears that the general statutory, goal and rule restrictions on residential division and development of the

subject property were not in effect when Orvall Cade acquired tax lots 1000 and 1001 on January 6, 1969, and tax lots 900 and 903 on August 10, 1981. As a result, these laws are not exempt under ORS 197.352. However, as discussed in Section V.(2) of this report, Orvall Cade's desired use of tax lots 900 and 903 was prohibited by the laws in effect when he acquired these tax lots.

Laws in effect when Orvall Cade acquired the subject property 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.

As explained in Section V.(1) of this report, Grace Cade is not an "owner" of tax lots 900, 903 and 1001 as that term is defined in ORS 197.352(11)(C). Therefore, the issue of whether any laws are exempt from ORS 197.352 is not relevant to tax lots 900, 903 and 1001 for Grace Cade's 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, the department finds that claimant Orvall Cade's claim is not valid as to tax lots 900 and 903 because his desired use of these tax lots was prohibited at the time he acquired them. Therefore, laws enacted or adopted since Orvall Cade acquired tax lots 900 and 903 do not restrict his use of these tax lots relative to uses permitted when he acquired them, with the effect of reducing their fair market value. The department finds that the claim is not valid as to Grace Cade for tax lots 900, 903 and 1001 because she is not an owner of these tax lots.

The department further finds laws enforced by the Commission or the department restrict the desired use of tax lots 1000 and 1001. 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 \$7,828,668. 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 compensation due for this claim, it would also be necessary to verify whether or the extent to which the desired use of tax lots 1000 and 1001 was allowed under the standards in effect when Orvall Cade acquired these tax lots. 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 tax lots 1000 and 1001 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 Orvall Cade to use tax lots 1000 and 1001 for a use permitted at the time he acquired these tax lots on January 6, 1969, and to allow Grace Cade to use tax lot 1000 for a use permitted at the time she acquired the acquired this tax lot on August 12, 1991.

At the time Grace Cade acquired tax lot 1000, it was subject to Clackamas County's acknowledged EFU zone.<sup>7</sup> When Grace Cade acquired tax lot 1000, her desired use of the property would have been governed by the county's acknowledged EFU zone and the applicable provisions of ORS 215 then in effect.<sup>8</sup> In 1991, ORS 215.263 (1991 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. ORS 215.283(1)(f) (1991 edition) generally allowed farm dwellings "customarily provided in conjunction with farm use." Non-farm dwellings were allowed under ORS 215.283(3) if they were determined to be compatible with farm use, not interfere seriously with accepted farm practices, not materially alter the stability of the land use pattern in the area and be situated on generally unsuitable land for the production of farm crops and livestock.

The claim does not establish whether or to what extent Grace Cade's desired division and development of tax lot 1000 was allowed under the standards in effect when she acquired the property on August 12, 1991. The department acknowledges that it is unlikely that the claimants' desired use could have satisfied the standards in effect when Grace Cade acquired tax lot 1000 in 1991.

In addition to the applicable provisions of Goal 3, ORS 215 and OAR 660 in effect when Grace Cade acquired tax lot 1000 on August 12, 1991, and other laws in effect when Orvall Cade acquired tax lots 1000 and 1001, there may be other laws that apply to the claimants' 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 tax lots 1000 and 1001 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 subject 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.

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<sup>7</sup> Clackamas County's EFU zone was acknowledged by the Commission for compliance with Goal 3 on December 31, 1981.

<sup>8</sup> 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).

This report addresses only those state laws that are identified in the claim, or that the department is certain apply to tax lots 1000 and 1001 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 before the department, Orvall Cade has not established that he is entitled to relief under ORS 197.352(1) for tax lots 900 and 903, as a result of land use regulations enforced by the Commission or the department because his desired use of tax lots 900 and 903 was prohibited under the zoning in effect when he acquired these tax lots in 1981. The department further finds that Grace Cade has not established that she is entitled to relief under ORS 197.352(1) for tax lots 900, 903 and 1001 as a result of land use regulations enforced by the Commission or the department because she is not an owner of these tax lots. Therefore, the department recommends that this claim be denied as to Orvall Cade for tax lots 900 and 903 and as to Grace Cade for tax lots 900, 903 and 1001.

The department otherwise 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 Orvall and Grace Cade's division of tax lot 1000 and Orvall Cade's division of tax lot 1001 into one-acre parcels or to their development of a dwelling on each parcel: applicable provisions of Goal 3, ORS 215 and OAR 660, division 33, enacted or adopted after each claimant acquired the subject tax lots. These land use regulations will not apply to the claimants only to the extent necessary to allow Orvall Cade to use tax lots 1000 and 1001 and Grace Cade to use tax lot 1000 for the use described in this report, and only to the extent that use was permitted when Orvall Cade acquired tax lots 1000 and 1001 on January 6, 1969, and when Grace Cade acquired tax lot 1000 on August 12, 1991. The department acknowledges that the relief to which Grace Cade is entitled under ORS 197.352 may not allow her to use tax lot 1000 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 tax lots for the use described in this report, subject to the standards in effect when Orvall Cade acquired tax lots 1000 and 1001 on January 6, 1969, and when Grace Cade acquired tax lot 1000 on August 12, 1991. On August 12, 1991, tax lot 1000 was subject to compliance with Goal 3 and OAR 660, division 5, as implemented by Clackamas County's acknowledged EFU zone, and the applicable provisions ORS 215 then in effect.
3. To the extent that any law, order, deed, agreement or other legally enforceable public or private requirement provides that tax lots 1000 and 1001 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 tax lots 1000 and 1001 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 tax lots 1000 and 1001, 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 tax lots 1000 and 1001 by the claimants.

## **VII. COMMENTS ON THE DRAFT STAFF REPORT**

The department issued its draft staff report on this claim on March 16, 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.