



# Oregon

Theodore R. Kulongoski, Governor

## Department of Land Conservation and Development

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April 23, 2007

To: Interested Persons

From: Lane Shetterly, Director



*Re: Ballot Measure 37 (ORS 197.352) Claim Number M130494*

*Claimant: Clinton Danker*

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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. M130494
(BALLOT MEASURE 37) OF	)	
Clinton Danker, CLAIMANT	)	

Claimant: Clinton Danker (the Claimant)

Property: Township 18S, Range 2W, Section 12, Tax lots 103, 104, 105, 106 and 107,  
Lane 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 Clinton Danker's division of tax lots 103, 105, 106 and 107 into thirty-one 5-acre parcels and to his development of a dwelling on each resulting undeveloped parcel: applicable provisions of Goal 3, ORS 215 and OAR 660, division 33. These land use regulations will not apply to the claimant only to the extent necessary to allow him to use tax lots 103, 105, 106 and 107 for the use described in this report, and only to the extent that use was permitted when he acquired those tax lots on June 30, 1962.
2. The action by the State of Oregon provides the state's authorization to the claimant to use tax lots 103, 105, 106 and 107 for the use described in this report, subject to the standards in effect on June 30, 1962.
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 claimant first obtains that permit, license or other form of authorization or consent.

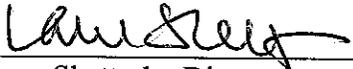
Such requirements may include, but are not limited to: a building permit, a land use decision, a "permit" as defined in ORS 215.402 or 227.160, other permits or authorizations from local, state or federal agencies and restrictions on the use of the subject property imposed by private parties.

4. Any use of tax lots 103, 105, 106 and 107 by the claimant 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 claimant to use tax lots 103, 105, 106 and 107, it may be necessary for him 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 claimant 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 the claimant.

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 23<sup>rd</sup> day of April, 2007.

FOR the DEPARTMENT OF  
ADMINISTRATIVE SERVICES:

  
David Hartwig, Administrator  
DAS, State Services Division  
Dated this 23<sup>rd</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.”

**ORS 197.352 (BALLOT MEASURE 37) CLAIM FOR COMPENSATION**  
**OREGON DEPARTMENT OF LAND CONSERVATION AND DEVELOPMENT**  
**Final Staff Report and Recommendation**

April 23, 2007

**STATE CLAIM NUMBER:** M130494

**NAME OF CLAIMANT:** Clinton Danker

**MAILING ADDRESS:** 10525 E. Minnesota Avenue  
Sun Lakes, AZ 85248

**PROPERTY IDENTIFICATION:** Township 18S, Range 2W, Section 12  
Tax lots 103, 104, 105, 106 and 107  
Lane County

**OTHER CONTACT INFORMATION:** Michael Farthing  
767 Willamette Street, Suite 203  
Eugene, Oregon 97401

**DATE RECEIVED BY DAS:** October 30, 2006

**180-DAY DEADLINE:** April 28, 2006

**I. SUMMARY OF CLAIM**

The claimant, Clinton Danker, seeks compensation in the amount of \$2.45 million 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 approximately 158-acre subject property<sup>1</sup> into thirty-one 5-acre parcels and to develop a dwelling on each resulting undeveloped parcel. The subject property is located at 37745 Wallace Creek Road, near Springfield, in Lane 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 Clinton Danker's division of tax lots 103, 105, 106 and 107 into 5-acre parcels and to his development of a dwelling on each resulting undeveloped parcel: applicable provisions of Statewide Planning Goal 3 (Agricultural Lands), ORS 215 and Oregon Administrative Rules

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<sup>1</sup> The subject property includes five tax lots. Tax lot 103 is 31.85 acres; tax lot 104 is 30.08 acres; tax lot 105 is 31.71 acres; tax lot 106 is 32.22 acres; and tax lot 107 is 32.38 acres.

(OAR) 660, division 33. These laws will not apply to the claimant only to the extent necessary to allow him to use tax lots 103, 105, 106 and 107 for the use described in this report, and only to the extent that use was permitted when he acquired those tax lots on June 30, 1962.

The department has further determined that this claim is not valid as to tax lot 104 because the claimant is not a current owner of that tax lot. (See the complete recommendation in Section VI of this report.)

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

#### **Comments Received**

On March 15, 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, three written comments were received in response to the 10-day notice.

The comments do not address whether the claim meets the criteria for relief under ORS 197.352. Comments concerning the effects a use of the subject property may have on surrounding areas are generally not something that the department is able to consider in determining whether to waive a state law. If funds do become available to pay compensation, then such effects may become relevant in determining which claims to pay compensation for instead of waive a state law. (See the comment letters in the department's claim file.)

### **IV. TIMELINESS OF CLAIM**

#### **Requirement**

ORS 197.352(5) requires that a written demand for compensation be made:

1. For claims arising from land use regulations enacted prior to the effective date of Measure 37 (December 2, 2004), within two years of that effective date, or the date the public entity applies the land use regulation as an approval criteria to an application submitted by the owner, whichever is later; or
2. For claims arising from land use regulations enacted after the effective date of Measure 37 (December 2, 2004), within two years of the enactment of the land use regulation, or the date the owner of the property submits a land use application in which the land use regulation is an approval criteria, whichever is later.

#### **Findings of Fact**

This claim was submitted to DAS on October 30, 2006, for processing under OAR 125, division 145. The claim identifies ORS 215, Goals 3 and 4 (Forest Lands) and Lane County Ordinance No. 884 as the bases for the claim. Only laws that were enacted or adopted prior to December 2, 2004, are the basis for this claim.

## **Conclusions**

The claim has been submitted within two years of the effective date of Measure 37 (December 2, 2004), based on land use regulations enacted or adopted prior to December 2, 2004, and is therefore timely filed.

## **V. ANALYSIS OF CLAIM**

### **1. Ownership**

ORS 197.352 provides for payment of compensation or relief from specific laws for “owners” as that term is defined in ORS 197.352. ORS 197.352(11)(C) defines “owner” as “the present owner of the property, or any interest therein.”

### **Findings of Fact**

The claimant, Clinton Danker, acquired the subject property on June 30, 1962, as reflected by a warranty deed included with the claim. On October 9, 1995, the claimant transferred the property to a revocable living trust, the Danker Living Trust, and subsequently transferred an undivided one-half interest in the property into two other trusts, the Clinton F. Danker Family Trust and Clinton F. Danker Survivor’s Trust, on October 4, 1996, as reflected by deeds included with the claim.<sup>2</sup> According to the Lane County Assessor’s office, the claimant conveyed tax lot 104 to a third party on August 2, 2006, and the claimant no longer owns that tax lot. The Lane County Assessor’s Office confirms the claimant’s current ownership of tax lots 103, 105, 106 and 107.

### **Conclusions**

The claimant, Clinton Danker, is an “owner” of tax lots 103, 105, 106 and 107 as that term is defined by ORS 197.352(11)(C), as of June 30, 1962. The claimant is not an “owner” of tax lot 104, as that term is defined in ORS 197.352(11)(C).

### **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 158-acre subject property into thirty-one 5-acre parcels and to develop a dwelling on each resulting undeveloped parcel, and that current state and local land use regulations prevent the desired use.<sup>3</sup>

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<sup>2</sup> Transfer of property to a revocable trust does not result in a change in ownership for purposes of ORS 197.352.

<sup>3</sup> The claim cites Goal 4 as applicable to this claim, but does not establish how this regulation applies to or restricts the desired use of the property. This report addresses only those regulations that the department finds are applicable

The claim is based generally on the applicable provisions of state law that require Exclusive Farm Use (EFU) zoning and restrict uses on EFU-zoned land. The claimant's property is zoned E-30 by Lane County as required by Goal 3 in accordance with ORS 215 and OAR 660, division 33, because the claimant's property is "agricultural land" as defined by Goal 3.<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 215.213, 215.263 and 215.780 and OAR 660, division 33, enacted or adopted pursuant to Goal 3, prohibit the division of EFU-zoned land in marginal lands counties into parcels less than 80 acres and establish standards for development of dwellings on existing or proposed parcels on that land.

ORS 215.780 generally 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). Under ORS 215.780(2)(a), a county may adopt a lower minimum lot or parcel size, subject to acknowledgment by the Commission. The Commission has acknowledged Lane County's E-30 zone, which requires a minimum lot or parcel size of 30 acres. 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 in a marginal lands county under ORS 215.213. OAR 660-033-0130(4)(e) (applicable to non-farm dwellings in marginal lands counties) became effective on August 7, 1993. The Commission subsequently adopted amendments to comply with House Bill 3326 (Chapter 704, Oregon Laws 2001, effective on January 1, 2002), which were effective on May 22, 2002. (See administrative rule history for OAR 660-033-0100, -0130 and -0135.)

The claimant acquired the subject property on June 30, 1962, prior to the adoption of the statewide planning goals and their implementing statutes and regulations. At that time the property was not zoned. However, as explained in Section V.(1) of this report, the claimant is no longer an "owner" of tax lot 104.

## **Conclusions**

The current zoning requirements, minimum lot size and dwelling standards established by applicable provisions of Goal 3, ORS 215 and OAR 660, division 33, were all enacted or adopted after the claimant acquired the subject property in 1962 and do not allow the desired division or residential development of tax lots 103, 105, 106 and 107. These laws restrict the use of those tax lots relative to the uses allowed when the claimant acquired the property.

As explained in Section V.(1) of this report, the claimant is no longer an "owner" of tax lot 104, as that term is defined in ORS 197.352(11)(C). Therefore no laws enforced by the Commission

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to and restrict the claimant's desired use of the subject property, based on the claimant's description of the desired use.

<sup>4</sup> The claimant's property is "agricultural land" because it contains Natural Resources Conservation Service Class I-IV soils.

or the department restrict the claimant's use of that tax lot with the effect of reducing its 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 uses that the claimant has identified. There may be other laws that currently apply to the claimant's use of the subject property, and that may continue to apply to the claimant's 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 claimant seeks 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 \$2.45 million 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 comparison of sales of comparable lots in the area, included with the claim.<sup>5</sup>

### **Conclusions**

As explained in Section V.(1) of this report, the claimant is Clinton Danker who acquired the subject property on June 30, 1962. However, the claimant is no longer an owner of tax lot 104 and, therefore, the claimant is not entitled to compensation under ORS 197.352 for that tax lot. Under ORS 197.352, the claimant is due compensation for land use regulations that restrict the use of tax lots 103, 105, 106 and 107 and have the effect of reducing their fair market value. Based on the findings and conclusions in Section V.(2) of this report, laws enacted or adopted since the claimant acquired tax lots 103, 105, 106 and 107 restrict the claimant's desired use of those tax lots. The claimant estimates that the effect of the regulations on the fair market value of the property is a reduction of \$2.45 million.

### **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.

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<sup>5</sup> The narrative estimating the reduction in value indicates that the claimant desires to sell or transfer the newly created parcels for development. ORS 197.352 only authorizes a state agency to waive a law in order to allow the current owner a use of the property permitted at the time that owner acquired the property. A determination of transferability is beyond the scope of relief that the department may grant under ORS 197.352. The Oregon Department of Justice has advised the department that "[i]f the current owner of the real property conveys the property before a new use allowed by the public entity is established, then the entitlement to relief will be lost."

## **Findings of Fact**

The claim is based on state land use regulations that restrict the use of the subject property, including applicable provisions of Goal 3, ORS 215 and OAR 660, division 33, which Lane County has implemented through its current E-30 zone. All of these land use regulations were enacted or adopted after the claimant 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. It appears that none of the general statutory, goal and rule restrictions on division and development of the claimant's property were in effect when the claimant acquired tax lots 103, 105, 106 and 107 in 1962. As a result, these laws are not exempt under ORS 197.352(3)(E) as to those tax lots.

As explained in Section V.(1) of this report, the claimant, Clinton Danker, is not longer an "owner" of tax lot 104 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 that tax lot.

Laws in effect when the claimant acquired the subject property are exempt under ORS 197.352(3)(E) and will continue to apply to the claimant's use of the property. There may be other laws that continue to apply to the claimant's use of the subject 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 claimant seeks a building or development permit to carry out a specific use, it may become evident that other state laws apply to that use. In some cases, some of these laws may be exempt under ORS 197.352(3)(A) to (D).

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 uses that the claimant has 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 claimant should be aware that the less information he has provided to the department in the claim, the greater the possibility that there may be additional laws that will later be determined to continue to apply to his use of the subject property.

## **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 laws that restrict the use of the subject 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 subject 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 use of tax lot 104 because the claimant is no longer an owner of that tax lot. Laws enforced by the Commission or the department do restrict the claimant's desired use of tax lots 103, 105, 106 and 107. 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 \$2.45 million. 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 claimant's desired use of tax lots 103, 105, 106 and 107 was allowed under the standards in effect when he acquired those 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 103, 105, 106 and 107 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 Clinton Danker to use tax lots 103, 105, 106 and 107 for a use permitted at the time he acquired those tax lots on June 30, 1962.

## **Conclusions**

Based on the record before the department, the claimant, Clinton Danker, has not established that he is entitled to relief under ORS 197.352(1) for tax lot 104 as a result of land use regulations enforced by the Commission or the department because he is no longer an owner of that tax lot. Therefore, the department recommends that the claim for tax lot 104 be denied. The department otherwise recommends that the claim be approved for tax lots 103, 105, 106 and 107, 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 Clinton Danker's division of tax lots 103, 105, 106 and 107 into thirty-one 5-acre parcels and to his development of a dwelling on each resulting undeveloped parcel: applicable provisions of Goal 3, ORS 215 and OAR 660, division 33. These land use regulations will not apply to the claimant only to the extent necessary to allow him to use tax lots 103, 105, 106 and 107 for the use described in this report, and only to the extent that use was permitted when he acquired those tax lots on June 30, 1962.
2. The action by the State of Oregon provides the state's authorization to the claimant to use tax lots 103, 105, 106 and 107 for the use described in this report, subject to the standards in effect on June 30, 1962.
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 claimant first obtains 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 103, 105, 106 and 107 by the claimant 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 claimant to use tax lots 103, 105, 106 and 107, it may be necessary for him 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 claimant 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 the claimant.

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

The department issued its draft staff report on this claim on April 3, 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.