



# Oregon

Theodore R. Kulongoski, Governor

## Department of Land Conservation and Development

635 Capitol Street NE, Suite 150

Salem, Oregon 97301-2524

Phone: (503) 373-0050

First Floor/Coastal Fax: (503) 378-6033

Second Floor/Director's Office Fax: (503) 378-5518

Third Floor/Measure 37 Fax: (503) 378-5318

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

April 26, 2007

To: Interested Persons

From: Lane Shetterly, Director



*Re: Ballot Measure 37 (ORS 197.352) Claim Number M130536*

*Claimant: Brett Johanson*

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. M130536  
(BALLOT MEASURE 37) OF )  
Brett Johanson, CLAIMANT )

Claimant: Brett Johanson (the Claimant)

Property: Township 2S , Range 7E, Section 23D: tax lot 1902  
Township 2S, Range 7E, Section 26: tax lot 800  
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

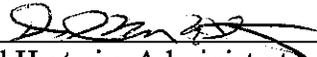
The Claim is denied as to laws administered by DLCD and the Land Conservation and Development Commission (LCDC) for the reasons set forth in the DLCD Report.

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:

  
Lane Shetterly, Director  
DLCD  
Dated this 26<sup>th</sup> day of April, 2007.

FOR THE DEPARTMENT OF  
ADMINISTRATIVE SERVICES:

  
David Hartwig, Administrator  
DAS, State Services Division  
Dated this 26<sup>th</sup> day of April, 2007.

**NOTICE OF RIGHT TO APPEAL OR OTHER JUDICIAL RELIEF**

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

1. Judicial review under ORS 183.484: Judicial review under ORS 183.484 may be obtained by filing a petition for review within 60 days from the service of this order. A petition for judicial review under ORS 183.484 may be filed in the Circuit Court for Marion County or the Circuit Court in the county in which you reside.
2. A cause of action under ORS 197.352 (Measure 37 (2004)): If a land use regulation continues to apply to the subject property more than 180 days after the present owner of the property has made written demand for compensation under ORS 197.352, the present owner of the property, or any interest therein, shall have a cause of action in the circuit court in which the real property is located.

(Copies of the documents that comprise the record are available for review at the Department's office at 635 Capitol Street NE, Suite 150, Salem, Oregon 97301-2540)

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

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

April 26, 2007

**STATE CLAIM NUMBER:** M130536

**NAME OF CLAIMANT:** Brett Johanson

**MAILING ADDRESS:** 20491 East Lolo Pass Road  
Rhododendron, Oregon 97049

**PROPERTY IDENTIFICATION:** Township 2S , Range 7E  
Section 23D: tax lot 1902  
Township 2S, Range 7E  
Section 26: tax lot 800  
Clackamas County

**OTHER CONTACT INFORMATION:** DJ Bleu  
43900 SE Music Camp Road  
Sandy, Oregon 97055

**DATE RECEIVED BY DAS:** November 2, 2006

**180-DAY DEADLINE:** May 1, 2007

**I. SUMMARY OF CLAIM**

The claimant, Brett Johanson, seeks compensation in the amount of \$1.3 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 2.82-acre subject property into eleven parcels for residential development. The subject property is located at 20491 East Lolo Pass Road, near Rhododendron, 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 not valid because neither the Land Conservation and Development Commission (the Commission) nor the department has enforced laws that restrict its use of the private real property relative to uses permitted when the claimant acquired the property, with the effect of reducing the property's fair market value. (See the complete recommendation in Section VI. of this report.)

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

#### **Comments**

Oregon Administrative Rule (OAR) 125-145-0100 provides an opportunity for the claimant or the claimant's authorized agent and any third parties to submit written comments, evidence and information in response to the draft staff report and recommendation. Such response must be filed no more than 10 calendar days after the date this report is mailed to the claimant and any third parties. Responses to this draft staff report and recommendation will be considered only as comments related to the claim described in this report.

### **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 the Department of Administrative Services (DAS) on November 2, 2006, for processing under OAR 125, division 145. The claim identifies Clackamas County's rural residential zoning as the basis for the claim. Only laws that were enacted or adopted prior to December 2, 2004, are the basis for this claim.

#### **Conclusions**

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

### **V. ANALYSIS OF CLAIM**

#### **1. Ownership**

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

## **Findings of Fact**

The claimant, Brett Johanson, acquired the subject property on April 8, 1977, as reflected by a warranty deed included with the claim. The Clackamas County Assessor's Office confirms the claimant's current ownership of the subject property.

## **Conclusions**

The claimant, Brett Johanson, is an "owner" of the subject property as that term is defined by ORS 197.352(11)(C), as of April 8, 1977.

## **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 2.82-acre subject property into eleven parcels for residential development and that the current zoning prevents the desired use.

The claim is based on the provisions of state law that regulate rural residential zoning. The claimant's property is zoned RRFF-5 (rural residential) by Clackamas County. The RRFF-5 zone is consistent with Statewide Planning Goal 14 (Urbanization), which generally requires that land outside of urban growth boundaries be used for rural uses. The county's current RRFF-5 zone was applied to the property on August 5, 1982, and requires a minimum of five 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>1</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 five acres, the minimum lot size for any new lot or parcel must equal or exceed five acres.

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<sup>1</sup> *1000 Friends of Oregon v. LCDC (Curry County)*, 301 Or 447 (1986).

The claimant acquired the subject property 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, it was zoned by Clackamas County as RR-2, which established a two-acre minimum lot size for the creation of new lots or parcels. However, because the Commission had not acknowledged Clackamas County's plan and land use regulations when the claimant acquired the property, the subject property was recognized as resource land when the claimant acquired it in 1977, and Goals 3 (Agricultural Lands) and 4 (Forest Land), as well as Goal 14, would have applied directly to the claimant's property had he sought the desired use at the time he acquired the property.<sup>2</sup> Alternatively, the claimant 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. However, through the county's acknowledgement process, the subject property was ultimately acknowledged as exceptions land pursuant to Goal 2, and zoned by the county for rural residential use pursuant to Goal 14. Therefore, because of the property's ultimate designation as rural residential exceptions land, the county could also require that the claimant's desired use be subject to compliance directly with Goal 14, which absent the county's restrictions, generally required that the size of lots or parcels in rural residential zones be a minimum of two acres.

Accordingly, division of the subject property would have been subject either to evaluation as resource land and therefore, subject to compliance with Goals 3 and 4 as well as Goal 14, or subject to compliance with the county's RR-2 zone, and the provisions of Goal 14 then in effect.

The claim does not establish that the claimant's desired division of the subject property would have been allowed at the time he acquired the property in 1977. To the contrary, the claimant's desired use would not have been permitted under Goal 14 and Clackamas County's RR-2 zone, in effect when the claimant acquired the property.<sup>3</sup>

## **Conclusions**

The minimum lot size requirements for rural residential lots or parcels established by Goal 14 and OAR 660-004-0040 were adopted after the claimant acquired the subject property in 1977

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<sup>2</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).

<sup>3</sup> Under Goal 3, the state standards for a division of land required that the created lots or parcels be of a size "appropriate for the continuation of the existing commercial agricultural enterprise within the area." Further, ORS 215.263 (1975 edition) required that all land divisions subject to EFU zoning comply with the legislative intent in ORS 215.243 (Agricultural Land Use Policy). Under Goal 4, the state standards required uses to "conserve forest lands for forest uses." Specifically, Goal 4 only allowed land divisions that would protect commercial forest lands for commercial forest uses. The claimant's desired division of the 2.82-acre property into eleven parcels could not have satisfied either of those standards.

and do not allow the desired division of the property. However, the claimant's desired division of the 2.82-acre subject property into 11 parcels for residential use was prohibited under the requirements of Goal 14 and the county's RR-2 zone in effect when the claimant acquired the property in 1977.

### **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 \$1.3 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 the claimant's assessment of the subject property's value.

#### **Conclusions**

As explained in Section V.(1) of this report, the claimant is Brett Johanson who acquired the subject property on April 8, 1977. The claimant has not established his entitlement to compensation under ORS 197.352 because the claimant's desired use of the property was prohibited under the laws in effect at the time he acquired the property. Accordingly, state land use regulations enacted or adopted by the Commission or the department since the claimant acquired the property do not have the effect of reducing the fair market value of the property relative to uses allowed in 1977.

### **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 Goal 14 and OAR 660-004-0040, which Clackamas County has implemented through its RRRFF-5 zone. With the exception of provisions of Goal 14, adopted before the claimant acquired the subject property on April 8, 1977, these state land use regulations were not in effect when the claimant 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 goal and rule restrictions on residential division of the claimant's property are not exempt under ORS 197.352(3)(E) to the extent they were adopted after the claimant acquired

the property. However, as discussed in Section V.(2) of this report, the claimant's desired use was prohibited by the laws in effect when he acquired the 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 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 Brett Johanson's claim is not valid because his desired use of the property was prohibited at the time he acquired the property. Therefore, neither the Commission nor the department has enforced laws enacted or adopted after the claimant acquired the subject property that restrict the claimant's use of the subject property relative to uses permitted when he acquired the property, with the effect of reducing the property's fair market value.

### **Conclusions**

Based on the record before the department, the claimant has not established that he is entitled to relief under ORS 197.352(1), as a result of land use regulations enforced by the Commission or the department because his desired use of the property was prohibited under the laws in effect when he acquired the property in 1977. Therefore, the department recommends that this claim be denied.

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

The department issued its draft staff report on this claim on April 4, 2007. OAR 125-145 0100(3), provided an opportunity for the claimant or the claimant's authorized agent and any third parties who submitted comments under OAR 125-145-0080 to submit written comments, evidence and information in response to the draft staff report and recommendation.