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 27, 2007

To: Interested Persons

From: Lane Shetterly, Director

*Re: Ballot Measure 37 (ORS 197.352) Claim Number M130554*

*Claimant: Don H. Sherwood II*

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. M130554 |
| (BALLOT MEASURE 37) OF | ) | |
| Don H. Sherwood II, CLAIMANT | ) | |

Claimant: Don H. Sherwood II (the Claimant)

Property: Township 19S, Range 47E, Section 31A, Tax lot 1700 (EFU-zoned portion), Malheur 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 Don Sherwood's division of a 2-acre parcel from the 40.04-acre subject property or to his development of a dwelling on that 2-acre parcel: applicable provisions of Goal 3, ORS 215 and OAR 660, division 33, enacted or adopted after August 8, 1989. These land use regulations will not apply to the claimant only to the extent necessary to allow him to use the subject property for the use described in this report, and only to the extent that use was permitted when he acquired the property on August 8, 1989.

2. The action by the State of Oregon provides the state's authorization to the claimant to use the subject property for the use described in this report, subject to the standards in effect on August 8, 1989. On that date, the property was subject to compliance with Goal 3 and OAR 660, division 5, as implemented by Malheur 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 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 the property 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 the subject property, 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 Deputy Director of the DLCD as a final order of DLCD and the Land Conservation and Development Commission under ORS 197.352, OAR 660-002-0010(8), and OAR 125, division 145, and by the Administrator for the State Services Division of the DAS as a final order of DAS under ORS 197.352, OAR 125, division 145, and ORS 293.

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

Cora R. Parker, Deputy Director
DLCD
Dated this 27th day of April, 2007.

FOR the DEPARTMENT OF ADMINISTRATIVE SERVICES:

David Hartwig, Administrator
DAS, State Services Division
Dated this 27th 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 27, 2007

| | |
|---|---|
| **STATE CLAIM NUMBER:** | M130554 |
| **NAME OF CLAIMANT:** | Don H. Sherwood II |
| **MAILING ADDRESS:** | 13448 Benton Road<br>Grand Ledge, Michigan 48837 |
| **PROPERTY IDENTIFICATION:** | Township 19S, Range 47E, Section 31A<br>Tax lot 1700 (EFU-zoned portion)<br>Malheur County |
| **OTHER CONTACT INFORMATION:** | Michael W. Horton<br>PO Box 1565<br>Nyssa, Oregon 97913 |
| **DATE RECEIVED BY DAS:** | November 3, 2006 |
| **180-DAY DEADLINE:** | May 2, 2007 |

## I. SUMMARY OF CLAIM

The claimant, Don Sherwood, seeks compensation in the amount of $28,762 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 a 2-acre parcel from the 40.04-acre subject property and to develop a dwelling on that 2-acre parcel.[1] The subject property is located north of the intersection of Highway 201 and Stringer Road, near Nyssa, in Malheur 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. 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

[1] Tax lot 1700 includes 55.44 acres. However, this claim relates only to the 40.04 acres that are zoned Exclusive Farm Use (EFU). A 15.4-acre portion of the subject property is located with the urban growth boundary (UGB) of the City of Nyssa. However, the claimant desires to divide and develop a two-acre portion of the subject property located outside of the UGB zoned EFU by Malheur County. The 15.4-acre portion of tax lot 1700 included within the UGB is not a part of this claim.

not apply to Don Sherwood's division of a 2-acre parcel from the 40.04-acre subject property and to his development of a dwelling on that 2-acre parcel: applicable provisions of Statewide Planning Goal 3 (Agricultural Lands), ORS 215 and Oregon Administrative Rules (OAR) 660, division 33, enacted or adopted after August 8, 1989. These laws will not apply to the claimant only to the extent necessary to allow him to use the subject property for the use described in this report, and only to the extent that use was permitted when he acquired the property on August 8, 1989. (See the complete recommendation in Section VI. of this report.)

## III. COMMENTS ON THE CLAIM

**Comments Received**

On March 20, 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 November 3, 2006, for processing under OAR 125, division 145. The claim identifies provisions of ORS 215, OAR 660, division 33, and Malheur County's Exclusive Farm Use (EFU) 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, Don Sherwood, acquired the subject property on August 8, 1989, as reflected by a decree of final distribution included with the claim. The Malheur County Assessor's Office confirms the claimant's current ownership of the subject property.

### Conclusions

The claimant, Don Sherwood, is an "owner" of the subject property as that term is defined by ORS 197.352(11)(C), as of August 8, 1989.

### 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 a 2-acre parcel from the 40.04-acre EFU-zoned subject property and to develop a dwelling on that 2-acre parcel, and that current land use regulations prevent the desired use.

The claim is based generally on the applicable provisions of state law that require EFU zoning and restrict uses on EFU-zoned land. The subject property, which includes a 40.04-acre portion of tax lot 1700, is zoned EFU by Malheur County as required by Goal 3, in accordance with ORS 215 and OAR 660, division 33, because the property is "agricultural land" as defined by Goal 3.[2] 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 development of dwellings on existing or proposed parcels on that land.

---

[2] The claimant's property is "agricultural land" because it contains Natural Resources Conservation Service Class I–IV soils.

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 were effective on May 22, 2002. (See administrative rule history for OAR 660-033-0100, -0130 and -0135.)

At the time the claimant acquired the 40.04-acre EFU-zoned subject property, the property was subject to Malheur County's acknowledged EFU zone.[3] When the claimant acquired the subject property, the claimant's 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.[4] In 1989, ORS 215.263 (1989 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) (1989 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 to what extent the claimant's desired division and development of the subject property was allowed under the standards in effect when he acquired the property on August 8, 1989.

**Conclusions**

The current zoning requirements, minimum lot size and dwelling standards established by Goal 3, ORS 215 and OAR 660, division 33, were all enacted or adopted after the claimant acquired the subject property in 1989 and do not allow the claimant's desired division or development of the property. However, the claim does not establish to what extent the claimant's desired use of the property complies with the standards for land divisions and development under Goal 3 and OAR 660, as implemented through Malheur County's comprehensive plan and EFU zone and applicable provisions of ORS 215, in effect when the claimant acquired the property on August 8, 1989.

---

[3] Malheur County's EFU zone was acknowledged by the Commission for compliance with Goal 3 on June 14, 1984.
[4] 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 the subject property based on the use 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 $28,762 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 real estate broker's assessment included with the claim.

**Conclusions**

As explained in Section V.(1) of this report, the claimant is Don Sherwood who acquired the subject property on August 8, 1989. Under ORS 197.352, the claimant is due compensation for land use regulations that restrict the use of the subject property and have the effect of reducing its fair market value. Based on the findings and conclusions in Section V.(2) of this report, laws enacted or adopted since the claimant acquired the subject property restrict the claimant's desired use of the property. The claimant estimates that the effect of the regulations on the fair market value of the subject property is a reduction of $28,762.

Without an appraisal or other documentation and without verification of whether or the extent to which the claimant's desired use of the subject property was allowed under the standards in effect when he acquired the property, it is not possible to substantiate the specific dollar amount by which the land use regulations have reduced the fair market value of the property. Nevertheless, based on the evidence in the record for this claim, the department determines that the fair market value of the subject property has been reduced to some extent as a result of land use regulations enforced by the Commission or the department.

**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 Goal 3, ORS 215 and OAR 660, division 33, which Malheur County has implemented through its current EFU zone. With the exception of amendments

enacted or adopted after August 8, 1989, Goal 3, ORS 215 and OAR 660 were in effect when 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 the general statutory, goal and rule restrictions on division and development of the subject property are not exempt under ORS 197.352(3)(E) only to the extent they were enacted or adopted after the claimant acquired the property on August 8, 1989. Provisions of Goal 3, ORS 215 and OAR 660 in effect when the claimant acquired the subject property in 1989 are exempt under ORS 197.352(3)(E) and will continue to apply to the property.

Other laws in effect when the claimant acquired the subject property are also 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 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 use 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 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 one or more laws that restrict the use of the property in a manner that reduces its fair market value. In lieu of compensation, the department may choose to not apply the law in order to allow the present owner to carry out a use of the property permitted at the time the present owner acquired the property. The Commission, by rule, has directed that if the department determines a claim is valid, the Director of the department must provide only non-monetary relief unless and until funds are appropriated by the legislature to pay claims.

**Findings of Fact**

Based on the findings and conclusions set forth in this report, laws enforced by the Commission or the department restrict the claimant's desired use of the subject property. The claim asserts that existing state land use regulations enforced by the Commission or the department have the effect of reducing the fair market value of the subject property by $28,762. However, because

the claim does not provide an appraisal or other relevant evidence demonstrating that the land use regulations described in Section V.(2) reduce the fair market value of the subject property, a specific amount of compensation cannot be determined. In order to determine a specific amount of the compensation due for this claim, it would also be necessary to verify whether or the extent to which the claimant's desired use of the subject property was allowed under the standards in effect when he acquired the property. Nevertheless, based on the record for this claim, the department has determined that the laws on which the claim is based have reduced the fair market value of the property to some extent.

No funds have been appropriated at this time for the payment of claims. In lieu of payment of compensation, ORS 197.352 authorizes the department to modify, remove or not apply all or parts of certain land use regulations to allow Don Sherwood to use the subject property for a use permitted at the time he acquired it on August 8, 1989.

**Conclusions**

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

1. In lieu of compensation under ORS 197.352, the State of Oregon will not apply the following laws to Don Sherwood's division of a 2-acre parcel from the 40.04-acre subject property or to his development of a dwelling on that 2-acre parcel: applicable provisions of Goal 3, ORS 215 and OAR 660, division 33, enacted or adopted after August 8, 1989. These land use regulations will not apply to the claimant only to the extent necessary to allow him to use the subject property for the use described in this report, and only to the extent that use was permitted when he acquired the property on August 8, 1989.

2. The action by the State of Oregon provides the state's authorization to the claimant to use the subject property for the use described in this report, subject to the standards in effect on August 8, 1989. On that date, the property was subject to compliance with Goal 3 and OAR 660, division 5, as implemented by Malheur 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 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 the property 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 the subject property, 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 5, 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.