



# 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>

May 11, 2007



To: Interested Persons

From: Lane Shetterly, Director

*Re: Ballot Measure 37 (ORS 197.352) Claim Number M130682*

*Claimants: Melvin and Robin Babb*

---

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. M130682  
(BALLOT MEASURE 37) OF )  
Melvin and Robin Babb, CLAIMANTS )

Claimants: Melvin and Robin Babb (the Claimants)

Property: Township 14S, Range 2E, Section 3, Tax lot 300  
Clackamas County (the Property)

Claim: The demand for compensation and any supporting information received  
from the Claimants by the State of Oregon (the Claim).

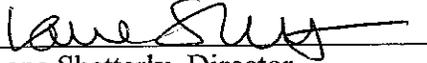
Claimants submitted the Claim to the State of Oregon under ORS 197.352. Under OAR 125-145-0010 *et seq.*, the Department of Administrative Services (DAS) referred the Claim to the Department of Land Conservation and Development (DLCD) as the regulating entity. This order is based on the record herein, 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

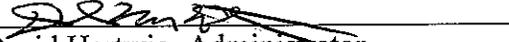
The Claim is denied as to laws administered by DLCD and the Land Conservation and Development Commission (LCDC) for the reasons set forth in the DLCD Report.

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 11<sup>th</sup> day of May, 2007.

FOR THE DEPARTMENT OF  
ADMINISTRATIVE SERVICES:

  
David Hartwig, Administrator  
DAS, State Services Division  
Dated this 11<sup>th</sup> day of May, 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**

May 11, 2007

**STATE CLAIM NUMBER:** M130682

**NAMES OF CLAIMANTS:** Melvin and Robin Babb

**MAILING ADDRESS:** 15600 S. Spangler Road  
Oregon City, Oregon 97045

**PROPERTY IDENTIFICATION:** Township 14S, Range 2E, Section 3  
Tax lot 300  
Clackamas County

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

**180-DAY DEADLINE:** May 12, 2007

**I. SUMMARY OF CLAIM**

The claimants, Melvin and Robin Babb, seek compensation in the amount of \$812,000 for the reduction in fair market value as a result of land use regulations that are alleged to restrict the use of certain private real property. The claimants desire compensation or the right to divide the 19.54-acre subject property into one-acre parcels and to develop a dwelling on each resulting undeveloped parcel. The subject property is located at 15600 South Spangler 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 not valid because the claimants' desired use of the subject property was prohibited under the laws in effect when Melvin Babb acquired the subject property in 1986 and Robin Babb acquired the subject property in 1991, and no laws enforced by the Land Conservation and Development Commission (the Commission) or the department since the claimants acquired the subject property have had the effect of reducing the fair market value of the property relative to uses permitted when they acquired the subject property. (See the complete recommendation in Section VI. of this report.)

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

#### **Comments Received**

On March 30, 2007, pursuant to Oregon Administrative Rule (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 are relevant to when Melvin Babb became the present owner of the subject property. The comments have been considered by the department in preparing this report. (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 November 13, 2006, for processing under OAR 125, division 145. The claim identifies provisions of ORS 215 and OAR 660, division 33, 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 Melvin Babb acquired the subject property on October 14, 1986, as reflected by a special warranty deed included with the claim.<sup>1</sup> On April 15, 1991, Melvin Babb conveyed a one-half interest in the subject property to his wife, claimant Robin Babb, as reflected by a deed creating estate by the entirety. The Clackamas County Assessor’s Office confirms the claimants’ current ownership of the subject property.

### Conclusions

The claimants, Melvin and Robin Babb, are “owners” of the subject property as that term is defined by ORS 197.352(11)(C). Melvin Babb has been an owner of the property since October 14, 1986.<sup>2</sup> Robin Babb has been an owner of the property since April 15, 1991.

### 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 acquired the property.

### Findings of Fact

The claim indicates that the claimants desire to divide the 19.54-acre subject property into one-acre parcels and to develop a dwelling on each resulting undeveloped parcel, and that the desired use is not allowed under current state land use regulations.

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 claimants’ property is zoned EFU by Clackamas County as required by Statewide Planning Goal 3 (Agricultural Lands), in accordance with ORS 215 and OAR 660, division 33, because the claimants’ property is

---

<sup>1</sup> Claimant Melvin Babb asserts acquisition of an ownership interest in the subject property on October 19, 1973, as reflected by a lease and option to purchase included with the claim. However, Melvin Babb assigned his option to Bruce Broetje on November 8, 1973, who subsequently exercised the option. Bruce Broetje then conveyed the property to Melvin Babb on October 14, 1986, as reflected by a special warranty deed.

<sup>2</sup> The department acknowledges receipt of the claimants’ correspondence dated May 3, 2007, relative to the department’s finding as to the claimants’ date of acquisition of the subject property. The department has considered the comment and finds that the record before the department supports the department’s initial determination of the claimants’ date of acquisition.

“agricultural land” as defined by Goal 3.<sup>3</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 development of dwellings on existing or proposed parcels 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 were effective on May 22, 2002. (See administrative rule history for OAR 660-033-0100, -0130 and -0135.)

At the time the claimants acquired the subject property, it was subject to Clackamas County’s acknowledged EFU zone.<sup>4</sup> When Melvin Babb acquired the property, it was zoned by Clackamas County as EFU-20, which allowed a 20-acre minimum lot size and permitted dwellings as an outright use. When the claimants acquired the subject property, the claimants’ 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>5</sup> In 1986 and 1991, ORS 215.263 (1985 and 1989 editions) 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) (1981 and 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 that the claimants’ desired division and development of the subject property were allowed under the standards in effect when Melvin Babb acquired the property on

---

<sup>3</sup> The claimants’ property is “agricultural land” because it contains Natural Resources Conservation Service Class I-IV soils.

<sup>4</sup> Clackamas County’s EFU zone was acknowledged by the Commission for compliance with Goal 3 on December 31, 1981.

<sup>5</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).

October 14, 1986, and when Robin Babb acquired the property on April 15, 1991. To the contrary, the claimants' desired division of the property into one-acre parcels was not allowed under either the county's acknowledged EFU zone or the requirements of ORS 215 then in effect.

### **Conclusions**

The current zoning requirements, minimum lot size and dwelling standards established by Goal 3, ORS 215 and OAR 660, division 33, were enacted or adopted after Melvin Babb acquired the subject property in 1986 and after Robin Babb acquired the subject property in 1991 and do not allow the claimants' desired division or development of the property. However, the claimants' desired division of the property was prohibited under the laws in effect when Melvin Babb acquired the property in 1986. Laws enacted or adopted since the claimants acquired the subject property do not restrict their desired use relative to the uses permitted at the time Melvin Babb acquired the property on October 14, 1986.

### **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 \$812,000 as the reduction in the subject property's fair market value due to the regulations that restrict the claimants' desired use of the property. This amount is based on an appraisal report included with the claim.

### **Conclusions**

As explained in Section V.(1) of this report, the claimants are Melvin Babb, who acquired the subject property on October 14, 1986, and his wife, Robin Babb. The claimants have not established that they are entitled to relief under ORS 197.352 because the claimants' desired division of the property was prohibited under the zoning in effect when Melvin Babb acquired the property. Laws enacted or adopted since the claimants acquired the subject property do not restrict their desired use relative to uses permitted at the time Melvin Babb acquired the property on October 14, 1986. Therefore, the fair market value of the subject property has not been reduced 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

Clackamas County has implemented through its current EFU zone. With the exception of amendments enacted or adopted after October 14, 1986, Goal 3, ORS 215 and OAR 660 were in effect when Melvin Babb acquired the subject property. The regulations in effect when he acquired the property prohibit the claimants' desired use of the property.

### **Conclusions**

With the exception of amendments to Goal 3, ORS 215 and OAR 660, land use regulations that restrict the claimants' desired use of the subject property were in effect when Melvin Babb acquired the property in 1986. These state land use regulations are not exempt under ORS 197.352(3)(E) to the extent they were adopted after Melvin Babb acquired the property in 1986. However, laws in effect when Melvin Babb acquired the property prohibit the claimants' desired division 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 do not restrict the claimants' desired use of the subject property relative to what was permitted when Melvin Babb acquired the property in 1986 because the claimants' desired division of property was prohibited under the laws in effect when he acquired it. Therefore, state land use regulations adopted after the claimants acquired the property do not reduce the property's fair market value.

### **Conclusions**

Based on the records and the foregoing findings and conclusions, the claimants have not established that they are entitled to relief under ORS 197.352(1) as a result of land use regulations enforced by the Commission or the department because the claimants' desired use of the subject property was prohibited under the laws in effect when Melvin Babb acquired the property in 1986.

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

The department issued its draft staff report on this claim on April 25, 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.