



# Oregon

Theodore R. Kulongoski, Governor

## Department of Land Conservation and Development

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July 9, 2007



To: Interested Persons

From: Lane Shetterly, Director

*Re: Ballot Measure 37 (ORS 197.352) Claim Number M130697*

*Claimants: Robert W. McCasland and Audia-Gordon Development, LLC*

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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. M130697  
(BALLOT MEASURE 37) OF )  
Robert W. McCasland and )  
Audia-Gordon Development, LLC, CLAIMANTS)

Claimants: Robert W. McCasland and Audia-Gordon Development, LLC  
(the Claimants)

Property: Township 16S, Range 14E, Section 9, Tax lots 100 and 101  
Crook County (the Property)

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

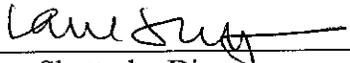
Claimants submitted the Claim to the State of Oregon under ORS 197.352. Under OAR 125-145-0010 *et seq.*, the Department of Administrative Services (DAS) referred the Claim to the Department of Land Conservation and Development (DLCD) as the regulating entity. This order is based on the record herein, 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 9<sup>th</sup> day of July, 2007.

FOR THE DEPARTMENT OF  
ADMINISTRATIVE SERVICES:

  
Janice K. Dean, SSD Administrator  
DAS, State Services Division  
Dated this 9<sup>th</sup> day of July, 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**

July 9, 2007

**STATE CLAIM NUMBER:** M130697

**NAMES OF CLAIMANTS:** Robert W. McCasland  
Audia-Gordon Development, LLC

**MAILING ADDRESSES:** Robert W. McCasland  
11693 SW Shumway Road  
Powell Butte, Oregon 97753

Audia-Gordon Development, LLC  
61295 Mountain Breezes Court  
Bend, Oregon 97702

**PROPERTY IDENTIFICATION:** Township 16S, Range 14E, Section 9  
Tax lots 100 and 101  
Crook County

**OTHER CONTACT INFORMATION:** Jeffrey M. Wilson  
446 NW Third Street, Suite 230  
Prineville, Oregon 97754

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

**DEADLINE FOR FINAL ACTION:<sup>1</sup>** May 6, 2008

**I. SUMMARY OF CLAIM**

The claimants, Robert McCasland and Audia-Gordon Development, LLC, seek compensation in the amount of \$1.6 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 claimants desire compensation or the right to divide the 78.2-acre subject property<sup>2</sup> into five-acre parcels.<sup>3</sup>

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<sup>1</sup> ORS 197.352, as originally enacted, required that final action on claims made under Measure 37 be made within 180 days of the date the claim was filed. In response to the large volume of claims filed in late 2006, the Oregon legislature passed House Bill 3546, which became effective on May 10, 2007. This legislation increased the amount of time state and local governments have to take final action on Measure 37 claims filed on or after November 1, 2006, by 360 days, to a total of 540 days.

<sup>2</sup> The subject property includes two tax lots. Tax lot 100 consists of 72.52 acres, and tax lot 101 consists of 5.68 acres.

<sup>3</sup> The claimants also request that the department rezone the subject property from exclusive farm use to Rural Service Center (RSC). However, ORS 197.352 does not allow what the claimants request. By its terms, ORS

The subject property is located at 11693 SW Shumway Road, near Powell Butte, in Crook 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 as to Audia-Gordon Development, LLC because its desired use of the subject property was prohibited under the laws in effect when it acquired the property in 2006. The department has further determined that this claim is not valid as to Robert McCasland because he is not an owner of the subject property.<sup>4</sup> (See the complete recommendation in Section VI. of this report.)

## III. COMMENTS ON THE CLAIM

### Comments Received

On May 16, 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, 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

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197.352 does not remove zoning or eliminate land use regulations. Rather, it provides that “the governing body responsible for enacting the land use regulation may modify, remove, or not to apply [*sic*] the land use regulation or land use regulations to allow the owner to use the property for a use permitted at the time the owner acquired the property.”

The claim also indicates that the claimants desire to sell or transfer the newly created parcels for development. In effect, the claimants request that a decision of the department to “not apply” (waive) certain laws as set forth in this report be transferable with the property. 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.”

<sup>4</sup> In response to the draft staff report dated June 12, 2007, pursuant to OAR 125-145-0080, the claimants’ attorney submitted a letter dated June 18, 2007. The comment has been considered by the department.

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 Goals 11 (Public Facilities and Services), 12 (Transportation) and 14 (Urbanization), provisions of ORS 100 and 215 and OAR 660, divisions 4, 11, 12, and 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 Robert McCasland originally acquired the subject property on April 9, 1968, as reflected by a contract of sale included with the claim. On March 8, 2006, however, Robert McCasland conveyed the subject property to claimant Audia-Gordon Development, LLC, as reflected by a memorandum of contract included with the claim.

The Crook County Assessor’s Office confirms Audia-Gordon Development, LLC’s current ownership of the subject property. Robert McCasland no longer owns the subject property.

**Conclusions**

Claimant Audia-Gordon Development, LLC is an “owner” of the subject property as that term is defined by ORS 197.352(11)(C), as of March 8, 2006.<sup>5</sup> Claimant Robert McCasland is not an “owner” of the subject property 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 claimants’ use of private real property in a manner that reduces the fair market value of the

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<sup>5</sup> Audia-Gordon Development, LLC is a domestic limited liability company registered with the Oregon Secretary of State.

property relative to how the property could have been used at the time the claimants or a family member acquired the property.

### **Findings of Fact**

The claim indicates that the claimants desired to divide the 78.2-acre subject property into five-acre parcels and that the use is not allowed under current land use regulations.<sup>6</sup>

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 subject property is zoned EFU-3 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.<sup>7</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.

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). Crook County's EFU-3 zone requires a minimum of 160 acres for the creation of a new lot or parcel. ORS 215.263 (2005 edition) establishes standards for the creation of new parcels for non-farm uses.

Claimant Audia-Gordon Development, LLC acquired the subject property on March 8, 2006, after the adoption of the statewide planning goals and their implementing statutes and regulations as identified above.

### **Conclusions**

The current zoning requirements and minimum lot size standards established by applicable provisions of Goal 3, ORS 215 and OAR 660, division 33, were all enacted or adopted before Audia-Gordon Development, LLC acquired the subject property on March 8, 2006. These land use regulations do not allow the desired division of the subject property. Laws enacted or adopted since Audia-Gordon Development, LLC acquired the subject property in 2006 do not restrict its desired use of the property relative to when it acquired it in 2006.

As explained in Section V.(1), Robert McCasland is not an "owner" of the subject property as that term is defined in ORS 197.352(11)(C). Therefore, no laws enforced by the Land Use

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<sup>6</sup> The claimants summarily list numerous state land use laws as applicable to this claim, but do not establish how the laws either apply to the claimants' desired use of the subject property or restrict its use with the effect of reducing its fair market value. On their face, most of the regulations either do not apply to the claimants' property or do not restrict the use of the claimants' property with the effect of reducing its fair market value. This report addresses only those regulations that the department finds are applicable to and restrict the claimants' desired use of the subject property, based on the claimants' description of their desired use.

<sup>7</sup> The claimants' property is "agricultural land" because it contains Natural Resources Conservation Service Class I-VI soils.

Conservation and Development Commission (the Commission) or the department restrict his use of private real property with the effect of reducing the fair market value of the property.

### **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 \$1.6 million as the reduction in the subject property’s fair market value due to the regulations that restrict the claimants’ desired use of the property. This amount is based on the claimants’ assessment of the subject property’s value.

#### **Conclusions**

As explained in Section V.(1) of this report, the claimants are Audia-Gordon Development, LLC, which acquired the subject property on March 8, 2006, and Robert McCasland. As explained in Section V.(1) of this report, Robert McCasland is not an “owner” of the subject property as that term is defined in ORS 197.352(11)(C). Therefore, no laws restrict his use of the subject property with the effect of reducing the fair market value of the property. No state laws enacted or adopted since Audia-Gordon Development, LLC acquired the subject property restrict the use of the property relative to the uses allowed in 2006. 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 the applicable provisions of Goal 3, ORS 215 and OAR 660, division 33, which Crook County has implemented through its current EFU-3 zone. As set forth in Section V.(2) of this report, all of the state land use regulations that restrict Audia-Gordon Development, LLC’s desired use of the subject property were in effect when it acquired the property in 2006.

#### **Conclusions**

All of the state land use regulations that restrict Audia-Gordon Development, LLC’s desired use of the subject property were in effect when it acquired the property. Therefore, these state land use regulations are exempt under ORS 197.352(3)(E), which exempts laws in effect when Audia-Gordon Development, LLC acquired the subject property.

As explained in Section V.(1) of this report, Robert McCasland is not an “owner” of the subject property 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 his claim.

## **VI. FORM OF RELIEF**

ORS 197.352(1) provides for payment of compensation to an owner of private real property if the Commission or the department has enforced one or more laws that restrict the use of the property in a manner that reduces its fair market value. In lieu of compensation, the department may choose to not apply the law in order to allow the present owner to carry out a use of the property permitted at the time the present owner acquired the property. The Commission, by rule, has directed that if the department determines a claim is valid, the Director of the department must provide only non-monetary relief unless and until funds are appropriated by the legislature to pay claims.

### **Findings of Fact**

Based on the findings and conclusions set forth in this report, laws enforced by the Commission or the department do not restrict Audia-Gordon Development, LLC’s desired use of the subject property relative to what was permitted when it acquired the property in 2006 and do not reduce the fair market value of the property. All state laws restricting the use of the subject property are exempt under ORS 197.352(3)(E). The department further finds that the claim is not valid as to Robert McCasland because he is not an owner of the subject property.

### **Conclusions**

Based on the record 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 Robert McCasland is not an owner of the subject property, and because no state land use regulations restrict Audia-Gordon Development, LLC’s desired use of the property relative to uses permitted when it acquired the property, with the effect of reducing the property’s fair market value. 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 June 12, 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.