



# Oregon

Theodore R. Kulongoski, Governor

## Department of Land Conservation and Development

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August 1, 2007

To: Interested Persons

From: Lane Shetterly, Director



*Re: Ballot Measure 37 (ORS 197.352) Claim Number M130873*

*Claimants: Sandi L. Cleveland and Nancy K. Brosnahan*

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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. M130873  
(BALLOT MEASURE 37) OF )  
Sandi L. Cleveland and Nancy K. Brosnahan, CLAIMANTS )

Claimants: Sandi L. Cleveland and Nancy K. Brosnahan (the Claimants)

Property: Township 3S, Range 1E, Section 11, Tax lot 400  
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 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 the claimants' division of the 35.6-acre subject property into twenty-three 1.43-acre parcels or to their development of a dwelling on each parcel: applicable provisions of Goals 4 and 14, ORS 215 and OAR 660-004-0040 and 660, division 6, enacted or adopted after May 12, 2005. These laws will not apply to the claimants only to the extent necessary to allow them to use the subject property for the use described in this report, and only to the extent that use was permitted when they acquired the property on May 12, 2005. The department acknowledges that the relief to which the claimants are entitled under ORS 197.352 will not allow the claimants to use the subject property in the manner set forth in the claim.
2. The action by the State of Oregon provides the state's authorization to the claimants to use the subject property for the use described in this report, subject to the standards in effect on May 12, 2005. At that time, the property was subject to applicable provisions of Goals 4 and 14, ORS 215 and OAR 660-004-0040 and 660, division 6, currently 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 claimants first obtain 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 subject property by the claimants 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 claimants to use the subject property, it may be necessary for them 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 claimants 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 claimants.

6. Nothing in this report or the state's final order for this claim constitutes any determination of ownership by the State of Oregon as to submerged or submersible lands, or as to public rights to the use of waters of the state.

This Order is entered by the Manager for the Measure 37 Services Division 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



Michael Morrissey, Manager  
DLCD, Measure 37 Services Division  
Dated this 1<sup>st</sup> day of August, 2007.

FOR the DEPARTMENT OF  
ADMINISTRATIVE SERVICES:

  
Janice Dean, SSD Administrator  
DAS, State Services Division  
Dated this 1<sup>st</sup> day of August, 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**

August 1, 2007

**STATE CLAIM NUMBER:** M130873

**NAMES OF CLAIMANTS:** Sandi L. Cleveland  
Nancy K. Brosnahan

**MAILING ADDRESS:** 51191 SE Cherryville Drive  
Sandy, Oregon 97055

**PROPERTY IDENTIFICATION:** Township 3S, Range 1E, Section 11  
Tax lot 400  
Clackamas County

**OTHER CONTACT INFORMATION:** Jim Zupancic, CRE  
Davis Wright Tremaine, LLP  
1300 SW Fifth Avenue, Suite 2300  
Portland, Oregon 97201

**DATE RECEIVED BY DAS:** November 17, 2006

**DEADLINE FOR FINAL ACTION:<sup>1</sup>** May 9, 2008

**I. SUMMARY OF CLAIM**

The claimants, Sandi Cleveland and Nancy Brosnahan, seek compensation in the amount of \$1,744,400 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 35.6-acre subject property into twenty-three 1.43-acre parcels and to develop a dwelling on each parcel. The subject property is located at 19311 South Beutel 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 valid. Department staff

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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.

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 the claimants' division of the 35.6-acre subject property into twenty-three 1.43-acre parcels and to their development of a dwelling on each parcel: applicable provisions of Statewide Planning Goals 4 (Forest Lands) and 14 (Urbanization), ORS 215 and Oregon Administrative Rules (OAR) 660-004-0040 and 660, division 6, enacted or adopted after May 12, 2005. These laws will not apply to the claimants only to the extent necessary to allow them to use the subject property for the use described in this report, and only to the extent that use was permitted when they acquired the property on May 12, 2005. The department acknowledges that the relief to which the claimants are entitled under ORS 197.352 will not allow the claimants to use the subject property in the manner set forth in the claim. (See the complete recommendation in Section VI. of this report.)

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

#### **Comments Received**

On May 31, 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 November 17, 2006, for processing under OAR 125, division 145. The claim identifies Goals 3 (Agricultural Lands) and 4, ORS 215.780 and OAR

660, divisions 6, 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**

The claimants, Sandi Cleveland and Nancy Brosnahan, acquired an interest in the subject property from their mother, Daisy Jones (formerly Daisy E. Neumann), as trustees of the Daisy E. Neumann Revocable Living Trust on May 12, 2005, as reflected by a revocable living trust agreement and a modified warranty deed included with the claim. Daisy Jones acquired the subject property on May 26, 1954, as evidenced by a bargain and sale deed and warranty deed included with the claim. The Clackamas County Assessor’s Office confirms the claimants’ current ownership of the subject property.

### **Conclusions**

The claimants, Sandi Cleveland and Nancy Brosnahan, are “owners” of the subject property as that term is defined by ORS 197.352(11)(C), as of May 12, 2005. Daisy Jones is a “family member” as defined by ORS 197.352(11)(A) and acquired the subject property on May 26, 1954.

### **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 or a family member acquired the property.

### **Findings of Fact**

The claim indicates that the claimants desire to divide the 35.6-acre subject property into twenty-three 1.43-acre parcels and to develop a dwelling on each parcel, and that current land use regulations prevent the desired use.<sup>2</sup>

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<sup>2</sup> The claimants summarily cite 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

The claim is based generally on the applicable provisions of state law that regulate rural residential zoning and forest zoning and restrict uses on rural residential- and forest-zoned lands.

Approximately 21 acres of the claimants' property (the eastern portion) is zoned Rural Residential Farm Forest 5 (RRFF-5) by Clackamas County. The county's RRFF-5 zone is a rural residential zone, in accordance with Goal 14, which prohibits urban use of rural lands. The county's RRFF-5 zone requires five acres for the creation of any new lot or parcel and was in effect and applied to the subject property on or before October 4, 2000.

Goal 14 became 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>3</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.

For rural residential properties less than one mile of the Urban Growth Boundary (UGB) for the Portland metropolitan area, the rule states that the minimum area for any new lot or parcel shall be 20 acres (OAR 660-004-0040(8)(e)).<sup>4</sup> Because approximately 21 acres of the claimants' property (the eastern portion) is located within one mile of the Portland metropolitan area UGB, all new lots or parcels must be at least 20 acres.<sup>5</sup>

The remaining approximately 15 acres of the claimants' property (the western portion) is zoned Timber (TBR) by Clackamas County as required by Goal 4, in accordance with ORS 215 and OAR 660, division 6, because that portion of the claimants' property is "forest land" as defined by Goal 4. Goal 4 became effective on January 25, 1975, and requires that forest land be zoned for forest use. Current land use regulations, including ORS 215.705 to 215.755 and 215.780 and OAR 660, division 6, enacted or adopted pursuant to Goal 4, generally prohibit the division of forest-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 generally establishes an 80-acre minimum size for the creation of new lots or parcels on forest-zoned land and became effective on November 4, 1993 (Chapter 792, Oregon Laws 1993). ORS 215.705 to 215.755 establish standards for the creation of new parcels and dwellings allowed in forest zones.

OAR 660, division 6, became effective on September 1, 1982, to implement Goal 4 and establish standards for divisions and development of land zoned for forest use, and was amended on March 1, 1994, to implement ORS 215.705 to 215.755 and 215.780. OAR 660-006-0025

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fair market value. On their face, most of these regulations either do not apply to the claimants' property or do not restrict the claimants' desired use of the 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 that desired use.

<sup>3</sup> *1000 Friends of Oregon v. LCDC (Curry County)*, 301 Or 447 (1986).

<sup>4</sup> The Portland metropolitan service area does not have an urban reserve area acknowledged to comply with OAR 660, division 21. Therefore, the provisions under OAR 660-004-0040(d) exempting lots or parcels from the 20-acre standard do not apply.

<sup>5</sup> The subject property is located east of Highway 99, near Oregon City, less than one mile west of the Portland metropolitan area urban growth boundary.

interprets the goal and statutory standard for uses allowed in forest zones. OAR 660-006-0026 interprets land division requirements in forest zones, and OAR 660-006-0027 and 660-006-0029 interpret the standards for dwellings in forest zones.

The claimants' family first acquired the subject property in 1954, prior to the adoption of the statewide planning goals and their implementing statutes and regulations. No county zoning applied to the subject property in 1954.

### **Conclusions**

The current zoning requirements, minimum lot size and dwelling standards established by applicable provisions of Goals 4 and 14, ORS 215 and OAR 660-004-0040 and 660, division 6, were all enacted or adopted after the claimants' family acquired the subject property. These laws restrict the use of the subject property relative to the uses allowed when the claimants' family acquired 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 regulations (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 \$1,744,400 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 a real estate broker's opinion and comparative market analysis included with the claim.

### **Conclusions**

As explained in Section V.(1) of this report, the claimants are Sandi Cleveland and Nancy Brosnahan whose family member acquired the subject property in 1954. Under ORS 197.352, the claimants are due compensation for land use regulations that restrict the use of the 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 claimants' family acquired the subject property restrict the claimants' desired use of the property. The claimants estimate that the effect of the regulations on the fair market value of the subject property is a reduction of \$1,744,400.

Without an appraisal or other documentation, it is not possible to substantiate the specific dollar amount by which the land use regulations have reduced the fair market value of the subject 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 since the claimants' family acquired the property.

#### **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 Goals 4 and 14, ORS 215 and OAR 660-004-0040 and 660, division 6, which Clackamas County has implemented through its current RRFF-5 and TBR zones. All of these land use regulations were enacted or adopted after the claimants' family acquired the subject property.

#### **Conclusions**

It appears that none of the general statutory, goal and rule restrictions on residential division and development of the subject property were in effect when the claimants' family acquired the property on May 26, 1954. As a result, these laws are not exempt under ORS 197.352(3)(E). Laws in effect when the claimants' family acquired the subject property are exempt under ORS 197.352(3)(E) and do not provide a basis for compensation. In addition, other land use laws enacted or adopted for a purpose set forth in ORS 197.352(3)(A) to (D) are also exempt and would not provide a basis for compensation.

### **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 claimants' 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 \$1,744,400. 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 claimants' desired use of the subject property was allowed under the standards in effect when their family 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 subject 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 Sandi Cleveland and Nancy Brosnahan to use the subject property for a use permitted at the time they acquired the property on May 12, 2005.

At the time the claimants acquired an interest in the subject property, it was zoned RRFF-5 and TBR by Clackamas County and subject to the current lot size and dwelling standards under Goals 4 and 14, ORS 215 and OAR 660-004-0040 and 660, division 6, as described in Section V.(2) of this report.

In addition to the provisions of Goals 4 and 14, ORS 215 and OAR 660-004-0040 and 660, division 6, in effect when the claimants acquired the property, there may be other laws that continue to apply to the claimants' use of the property that have not been identified in the claim. The department also notes that ORS 215.730 and OAR 660, division 6, particularly OAR 660-006-0027, -0029 and -0035, include fire protection standards for dwellings and structures in forest zones. ORS 197.352 (3)(B) specifically exempts regulations "restricting or prohibiting activities for the protection of public health and safety, such as fire and building codes. . . ." Accordingly, the siting standards for dwellings and structures in forest zones in ORS 215.730 and OAR 660, division 6, are exempt under ORS 197.352(3)(B).

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 claimants have 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 claimants should be aware that the less information they have 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 their use of the subject property.

### **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 the claimants' division of the 35.6-acre subject property into twenty-three 1.43-acre parcels or to their development of a dwelling on each parcel: applicable provisions of Goals 4 and 14, ORS 215 and OAR 660-004-0040 and 660, division 6, enacted or adopted after May 12, 2005. These laws will not apply to the claimants only to the extent necessary to allow them to use the subject property for the use described in this report, and only to the extent that use was permitted when they acquired the property on May 12, 2005. The department acknowledges that the relief to which the claimants are entitled under ORS 197.352 will not allow the claimants to use the subject property in the manner set forth in the claim.
2. The action by the State of Oregon provides the state's authorization to the claimants to use the subject property for the use described in this report, subject to the standards in effect on May 12, 2005. At that time, the property was subject to applicable provisions of Goals 4 and 14, ORS 215 and OAR 660-004-0040 and 660, division 6, currently 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 claimants first obtain 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 subject property by the claimants 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 claimants to use the subject property, it may be necessary for them 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 claimants 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 claimants.

6. Nothing in this report or the state's final order for this claim constitutes any determination of ownership by the State of Oregon as to submerged or submersible lands, or as to public rights to the use of waters of the state.

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

The department issued its draft staff report on this claim on July 11, 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.