Oregon
Theodore R. Kulongoski, Governor

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October 10, 2007

To: Claimant and Interested Persons

From: Cora R. Parker, Acting Director

*Re: Ballot Measure 37 (ORS 197.352) Claim Number M131207*

*Claimants: Jeff and Pat Dowell*

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Enclosed, in regard to the above-referenced claim for compensation under Ballot Measure 37 (ORS 197.352), is the Department of Land Conservation and Development's Draft Staff Report and Recommendation.

This Draft Staff Report and Recommendation sets forth the department's evaluation of and recommendation on the claim. Oregon Administrative Rule 125-145-0100(3) provides that the claimant (or the claimant's agent) and any third parties who submitted comments on the claim may submit written comments, evidence, and information in response to any third-party comments contained in the report, and to the staff report and recommendation itself. Such response must be filed no more than 15 calendar days after the date of mailing of this report. Any response from you must be delivered to the Oregon Department of Administrative Services (DAS), 1225 Ferry Street SE, U160, Salem, Oregon 97301, and will be deemed timely filed if either postmarked on the 15th day or actually delivered to DAS by the close of business on the 15th day.

This department will review any responses submitted, and a Final Order on the claim will be issued after such review.

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

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

October 10, 2007

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| **STATE CLAIM NUMBER:** | M131207 |
| **NAMES OF CLAIMANTS:** | Jeff and Pat Dowell |
| **MAILING ADDRESS:** | 10705 NE 38th Avenue<br>Vancouver, Washington 98686 |
| **PROPERTY IDENTIFICATION:** | Township 16S, Range 11E, Section 19<br>Tax lot 100<br>Deschutes County |
| **OTHER CONTACT INFORMATION:** | Robert S. Lovlien<br>PO Box 1151<br>Bend, Oregon 97709 |
| **DATE RECEIVED BY DAS:** | November 24, 2006 |
| **DEADLINE FOR FINAL ACTION:**[1] | May 17, 2008 |

## I. SUMMARY OF CLAIM

The claimants, Jeff and Pat Dowell, seek compensation in the amount of $100,000 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 complete construction of an existing dwelling on the 4.3-acre subject property. The subject property is located at 65595 Sisemore Road, near Bend, in Deschutes County. (See claim).

## II. SUMMARY OF STAFF RECOMMENDATION

Based on the preliminary 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 not apply to Jeff and Pat Dowell's completion of an existing dwelling on the

[1] 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.

4.3-acre subject property: applicable provisions of Statewide Planning Goal 5 (Natural Resources, Scenic and Historic Areas, and Open Spaces), and Oregon Administrative Rules (OAR) 660, division 23, enacted or adopted after September 20, 1989. 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 in 1989. (See the complete recommendation in Section VI. of this report).

## III. COMMENTS ON THE CLAIM

**Comments Received**

On July 6, 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, one written comment was received in response to the 15-day notice.

The comment is relevant to whether a state law restricts the claimants' use of the subject property; whether the restriction of the claimants' use of the subject property reduces the fair market value of the property; and whether the laws that are the basis for the claim are exempt under ORS 197.352(3). The comment has been considered by the department in preparing this report. (See the comment letter 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 24, 2006, for processing under OAR 125, division 145. The claim identifies Deschutes County's Wildlife Area (WA) combining zone's 300-foot setback restriction and "ORS 215 and implementing statutes and OARs" 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, Jeff and Pat Dowell, acquired the subject property on September 20, 1989, as reflected by an unrecorded contract of sale included with the claim.[2] The Deschutes County Assessor's Office confirms the claimants' current ownership of the subject property.

**Conclusions**

The claimants, Jeff and Pat Dowell, are "owners" of the subject property as that term is defined by ORS 197.352(11)(C), as of September 20, 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 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 complete construction of an existing dwelling on the 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 local governments to inventory land and adopt programs to protect natural resources and to conserve scenic, historic and open space resources. The claimants' property is subject to Deschutes County's WA combining zone as required by Goal 5, in accordance with OAR 660, division 23, because the claimants' property provides significant habitat for wildlife. Goal 5 became effective on January 25, 1975, and prior to the adoption of local government programs, the requirements of Goal 5 applied directly to individual properties through the land use application

[2] The claimants assert they acquired the subject property on August 3, 1989, as reflected by the contract of sale included with the claim; however, that contract did not become effective until it was signed by the seller on September 20, 1989.

process. Specifically, Goal 5 required applicants to establish how the natural resources, scenic and historic areas and open space resources on individual properties would be protected through the proposed development. Under OAR 660, division 16, requirements and application procedures for complying with Goal 5 became effective on June 29, 1981. OAR 660, division 23, replaced division 16, and established additional procedures and requirements for complying with Goal 5, and became effective on September 1, 1996.

When the claimants acquired the subject property on September 20, 1989, the claimants' property was subject to Deschutes County's acknowledged comprehensive plan and WA combining zone.[3] That zone allowed uses as permitted by the underlying zone and required setbacks as specified by the underlying zone (in this case, Deschutes County's Forest Use (F-2) zone). At that time, the claimants' desired use of the property would have been subject to compliance with Goal 5, and OAR 660, division 16, as implemented through the county's acknowledged comprehensive plan and WA combining zone.[4]

The claim does not establish whether or to what extent the claimants' desired development of the subject property was allowed under the standards in effect when they acquired the property on September 20, 1989.

**Conclusions**

The current zoning requirements, and dwelling standards established pursuant to Goal 5, and OAR 660, division 16, for lands identified as significant wildlife habitat, were enacted or adopted after the claimants acquired the subject property in 1989, and do not allow the claimants' desired development of the property. However, the claim does not establish whether or to what extent the claimants' desired use of the subject property complies with the standards for development in Deschutes County's acknowledged comprehensive plan and WA combining zone in effect when the claimants acquired the property on September 20, 1989.

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 claimants have identified. There may be other laws that currently apply to the claimants' use of the subject property, and that may continue to apply to the claimants' 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 claimants seek a building or development permit to carry out a specific use, it may become evident that other state laws apply to that use.

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[3] Deschutes County's WA combining zone was acknowledged by the Commission for compliance with Goal 5 on April 30, 1981.

[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, 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).

## 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 $100,000 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 the claimants' assessment of the subject property's value.

### Conclusions

As explained in Section V.(1) of this report, the claimants are Jeff and Pat Dowell, who acquired the subject property on September 20, 1989. Under ORS 197.352, the claimants are 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 claimants acquired the subject property restrict the claimants' desired use of the property. The claimants estimate that the effect of the land use regulations on the fair market value of the subject property is a reduction of $100,000.

Without an appraisal or other documentation, and without verification of whether or the extent to which the claimants' desired use of the subject property was allowed under the standards in effect when they 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 5, and OAR 660, division 23, which Deschutes County has implemented through its current WA combining zone. With the exception of amendments adopted after September 20, 1989, Goal 5 and OAR 660, division 16, were in effect when the claimants 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 residential 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 claimants acquired the property. Provisions of Goal 5 and OAR 660, division 16, in effect when the claimants 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 claimants acquired the subject property are exempt under ORS 197.352(3)(E) and will also continue to apply to the claimants' use of the property. In addition, because the underlying zone is a forest zone, the department 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).

There may be other laws that continue to apply to the claimants' use of the subject 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 claimants seek a building or development permit to carry out a specific use, it may become evident that other state laws currently apply to that use and may continue to 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 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.

## 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 $100,000. 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 property was allowed under the standards in effect when they 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 Jeff and Pat Dowell to use the subject property for a use permitted at the time they acquired the property on September 20, 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 Jeff and Pat Dowell's completion of an existing dwelling on the parcel: applicable provisions of Goal 5, and OAR 660, division 23, enacted or adopted after September 20, 1989. These land use regulations 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 September 20, 1989.

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 September 20, 1989. On that date, the property was subject to compliance with Goal 5 and OAR 660, division 16, as implemented through Deschutes County's acknowledged comprehensive plan and WA combining zone.

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. NOTICE OF OPPORTUNITY TO COMMENT

This staff report is not a final decision by the department and does not authorize any use of the property that is the subject of this report. OAR 125-145-0100 provides 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. Such response must be filed no more than 15 calendar days after the date this report is mailed to the claimants and any third parties. Responses to this draft staff report and recommendation will be considered only as comments related to the claim described in this report. All responses must be delivered to the Oregon Department of Administrative Services (DAS), Measure 37 Unit, Risk Management–State Services Division, 1225 Ferry Street SE, U160, Salem, Oregon 97301-4292 and will be deemed timely filed if either postmarked on the 15th day, or actually delivered to DAS by the close of business on the 15th day. Note: Please reference the claim number, claimant name and clearly mark your comments as "Draft Staff Report comments." Comments must be submitted in writing only. Those comments submitted electronically or by facsimile will not be accepted.