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IN THE CIRCUIT COURT OF THE STATE OF OREGON
FOR THE COUNTY OF YAMHILL

JAMES MILLER and JOYCE MILLER,
Petitioners/Plaintiffs,

v.

STATE of OREGON, by and through The
DEPARTMENT OF LAND
CONSERVATION AND DEVELOPMENT
and The DEPARTMENT OF
ADMINISTRATIVE SERVICES,

Respondents/Defendants.

Case No. CV060283
TRIAL MEMORANDUM
Time: 9:00 a.m.
Date: March 6, 2007
Courtroom: C

INTRODUCTION

This is a Measure 37 case in which the parties have agreed that the only issues to be litigated at the March 6, 2007, trial are: (1) whether petitioner has established a legal defect in respondents' final order on his Measure 37 claim; and (2) if so, whether petitioner is entitled only to a remand of the final order, or also to monetary compensation. No facts are in dispute; this hearing will concern only the legal significance of the facts to which the parties agree. Moreover, the parties have agreed that the March 6 trial will not address the *amount* of any monetary compensation to which petitioner may be entitled, if he prevails on the legal questions that his petition for judicial review presents.

This case differs from many Measure 37 cases in that petitioner does not challenge the State's determination of the date on which he acquired the real property at issue. To the contrary, petitioner and the State agree that petitioner acquired the land on November 1, 1986. The parties also agree that, on that date, petitioner's land was subject to Yamhill County's

1 acknowledged AF-20 zone, which generally required a minimum parcel size of 20 acres.
2 Finally, petitioner and the State agree that the State elected to provide Measure 37 “waiver”
3 relief to petitioner in lieu of compensation. Therefore, petitioner is entitled to Measure 37 relief
4 only in accordance with the terms of Measure 37: waiver of certain land use regulations enacted
5 or adopted after petitioner’s 1986 acquisition date “to allow the owner to use the property for a
6 use permitted at the time the owner acquired the property.” ORS 197.352(8); *see also* ORS
7 197.352(10).

8 The dispute in this case arises because petitioner’s Measure 37 claim is based on his
9 desire to divide his 19-acre parcel into seven parcels and to develop a residence on each resulting
10 undeveloped parcel. As the State acknowledged in its final order, the state waiver likely will not
11 allow petitioner to carry out his plan, as laws prohibiting partition of the 19-acre property already
12 were in place when petitioner acquired the property in 1986. However, because petitioner’s
13 property was within an “acknowledged” county zone in 1986, the viability of his desired use
14 initially would be evaluated under the county’s comprehensive plan. Consequently, the State
15 cannot (and did not) determine what specific uses were allowed in 1986 and would be allowed to
16 petitioner post-waiver; instead, the order identifies only which state laws will not be applied to
17 that use.

18 Unsurprisingly, petitioner is not satisfied with the state waiver. He argues that he is
19 entitled to a completely different waiver and one not authorized by the express terms of Measure
20 37. Petitioner asks the court to find that Measure 37 requires the State to grant relief that will
21 allow him to use the property as he would have been able on November 1, 1986, *if* he then had
22 applied for and obtained a change of zoning to rural residential, which would have allowed 2.5-
23 acre lots. Petitioner acknowledges that he did not attempt to get a zone change in 1986.
24 Nonetheless, he contends that he is entitled to a waiver of all land use regulations that *would* now
25 apply to the property, if he had done so, including Goal 14 (Urbanization) and certain related
26 regulations. Petitioner’s argument fails for the simple reason that Measure 37 does not authorize

1 waiver of regulations that do not currently apply to property; nor does it allow uses that were not
2 permitted at the time of acquisition. Rather, Measure 37 permits the State to waive land use
3 regulations only as necessary “to allow the owner to use the property for a use permitted at the
4 time the owner acquired the property.” ORS 197.352(8). Petitioner could not have divided his
5 property into 2.5-acre lots when he acquired it in 1986; consequently, he is not entitled to a
6 waiver that would allow him to accomplish that now.

7 Petitioner disagrees with one additional aspect of the final order: its statement that
8 different standards apply to dwellings in mixed agricultural and forest zones depending on what
9 the predominant use of the property was in 1993. Petitioner appears to be concerned that the
10 “predominant use” discussion means that the State is continuing to apply, *i.e.*, not waiving, land
11 use regulations that applied in 1993. Petitioner misunderstands the final order. The section of
12 the order that includes the “predominant use” discussion describes the land use regulations that
13 currently would apply to the property *without* a waiver; it does not identify regulations that will
14 continue to apply even after a waiver is granted. Nothing in the final order suggests that the
15 1993 “predominant use” test will continue to apply to petitioner’s use of his property post-
16 waiver.

17 In sum, the State is entitled to a judgment affirming its final order on petitioner’s
18 Measure 37 claim because: (1) the State properly waived only certain land use regulations that
19 *do* apply to petitioner’s property, not those regulations that *would have* applied to the property if
20 petitioner successfully had applied for a zone change in 1986; and (2) the discussion of the 1993
21 “predominant use” test in the final order merely describes an aspect of current law, and does not
22 imply that the test will continue to apply to petitioner’s use of the property post-waiver.
23 Accordingly, the State will move for a judgment of involuntary dismissal at the close of
24 petitioner’s case on the ground that upon the facts and the law, petitioner has shown no right to
25 relief. ORCP 54(B)(2). The State will ask that dismissal be with prejudice, as the State is
26 entitled to judgment on all claims as a matter of law.

1 **BACKGROUND**

2 **A. Oregon’s land use laws**

3 The primary components of Oregon’s land use planning system were created with the
4 passage of Senate Bill 10 in 1969, and Senate Bills 100 and 101 in 1973.¹ Senate Bill 10
5 required cities and counties to adopt comprehensive land use plans and to enact zoning
6 ordinances to implement those plans. Senate Bill 100 created a state agency – the Land
7 Conservation and Development Commission (“LCDC”) – to establish and amend statewide land
8 use goals, and to review and “acknowledge” local plans and regulations to ensure compliance
9 with the statewide goals. Senate Bill 101 amended the state statutes authorizing counties to
10 adopt exclusive farm use zones.

11 Together, these statutes established the basic framework for land use planning in Oregon,
12 and all were in effect when petitioner acquired his property. With some exceptions, the state
13 statutes, goals and rules set a regulatory minimum, which local governments – cities, counties,
14 and special districts – may exceed. Local governments’ land use decisions must be consistent
15 with the local comprehensive plans and land use regulations, and with any directly applicable
16 state laws. *See e.g., Alexanderson v Polk County Commissioners*, 289 Or 427 (1980). The main
17 area where state laws are directly applicable is in the regulation of uses permitted on lands zoned
18 for exclusive farm use.

19 By the time petitioner acquired his property in November 1986, LCDC had
20 acknowledged Yamhill County’s comprehensive land use plan. *See Maresh v Yamhill County*,
21 68 Or App 471, 473 (1984) (“The county’s comprehensive plan and implementing legislation
22 were acknowledged by LCDC in June, 1980”). Consequently, the statewide land-use planning
23 goals no longer apply directly to Yamhill County’s land-use decisions; however, state statutes
24 continue to apply. In accordance with Yamhill County’s acknowledged comprehensive plan,
25

26 ¹ 1969 Or Laws Chap 324 (SB 10); 1973 Or Laws Chap 80 (SB 100); and 1973 Or Laws Chap 503 (SB 101).

1 petitioner's property had been zoned Agricultural/Forestry District, AF-20. That zoning
2 generally imposed a 20-acre minimum parcel-size requirement.

3 **B. Measure 37**

4 A property owner qualifies for Measure 37 relief if: (1) a public entity enacts or enforces
5 a "land use regulation" after December 2, 2004, that (2) restricts the owner's use and (3) has the
6 effect of reducing the fair market value of the owner's property. ORS 197.352(1). Section 3 of
7 Measure 37 provides that certain land use regulations shall not be a basis for a written demand
8 under Section 1, notably regulations in effect when the owner or a family member acquired the
9 property. ORS 197.352(3)(E). Section 11 defines "owner" as the "present owner" of the
10 property, and lists the relationships on which a "family member" finding may be based. ORS
11 197.352(11)(A), (C).

12 For regulations enacted prior to the effective date of Measure 37 (December 2, 2004),
13 Section 5 requires owners to submit written demands by December 2, 2006, or the date on which
14 a land use regulation is applied "as an approval criteria [*sic*]" on a specific land use application,
15 whichever is later. After determining that an owner submitted a timely, valid written demand,
16 the public entity has the option to pay compensation or to "modify, remove, or not to [*sic*] apply"
17 land use regulations to the extent necessary "to allow the owner to use the property for a use
18 permitted at the time the owner acquired the property." ORS 197.352(8); *see also* ORS
19 197.352(10). In this case, the State determined that petitioners' Measure 37 claim was valid and
20 granted waiver relief in lieu of compensation.²

21 **C. Statement of undisputed facts**

22 For purposes of this hearing, the following facts appear to be undisputed:
23
24

25 ² Allowing the owner to use the property in a way that would otherwise be prohibited by land
26 use regulations is commonly referred to as granting a Measure 37 "waiver." DLCD can pay
compensation only if and when the legislature appropriates funds for that purpose. *See* OAR
660-002-0010(8)(c)

1 1. Petitioner currently owns real property in Yamhill County, Oregon, that is the
2 subject of Measure 37 claim number M122011. (Ex 1 at 3, 6).³

3 2. Petitioner acquired the real property on November 1, 1986. (Ex 1 at 3).

4 3. In its final order on Measure 37 claim number M122647, the State granted
5 petitioners relief in the form of a “waiver” dating back to November 1, 1986. The final order
6 granting the waiver states, in pertinent part:

7 The Claim is approved as to laws administered by DLCD and the
8 Land Conservation and Development Commission (LCDC) for the
9 reasons set forth in the DLCD Report, and subject to the following
10 terms:

11 1. In lieu of compensation under ORS 197.352, the State of
12 Oregon will not apply the following laws to James Millers’
13 division of the 19-acre property into seven parcels or to his
14 development of a dwelling on each resulting undeveloped parcel:
15 applicable provisions of Goals 3 and 4, ORS 215 and OAR 660,
16 divisions 6 and 33, enacted or adopted after November 1, 1986.
17 These land use regulations will not apply to the claimant only to
18 the extent necessary to allow him to use the subject property for
19 the use described in this report, and only to the extent that use was
20 permitted when he acquired the property on November 1, 1986.
21 The department acknowledges that the relief to which the claimant
22 is entitled under ORS 197.352 will likely not allow the claimant to
23 use the property to the extent desired by the claimant, as described
24 in this report.

25 2. The action by the State of Oregon provides the state’s
26 authorization to the claimant to use the property for the use
described in this report, subject to the standards in effect on
November 1, 1986. On that date, the property was subject to
compliance with Yamhill County’s acknowledged EFU zone, and
the applicable provisions of ORS 215 and OAR 660, then in effect.

(Ex 2 at 1).⁴

21 A footnote in the final staff report, which is incorporated into the final order, explains the
22 State’s disagreement with petitioner’s theory that he is entitled to more:

23 [T]he claimant’s attorney submitted a letter, dated June 26, 2006,
24 to clarify that, in addition to the desired use as described in this

25 ³ The State has attached the petition for judicial review as Exhibit 1 to this memorandum.

26 ⁴ Petitioners attached the final order to their petition for judicial review, and the State has
attached it as Exhibit 2 to this memorandum.

1 report, the claimant requests that the department waive the subject
2 property's agricultural/forestry zoning and allow the claimant to
3 apply to the county to rezone the property to a rural residential
4 zone, using the zone change criteria in effect when he acquired the
5 property in 1986. Further, in anticipation of the county granting
6 the zone change using the 1986 process, the claimant requests that
7 the provisions of Goal 14 and OAR 660-004-0018 and 660-004-
8 0040 that would apply to the new rural residential zoning be
9 waived as of the date the claimant acquired the property in 1986.
10 ORS 197.352 does not allow what the claimant requests. By its
11 terms, ORS 197.352 does not remove zoning or eliminate land use
12 regulations. Rather, it provides that "the governing body
13 responsible for enacting the land use regulation may modify,
14 remove, or not to apply [*sic*] the land use regulations to allow the
15 owner to use the property for a use permitted at the time the owner
16 acquired the property." It does not allow the department to waive
17 laws that would have applied under a different zone, had the
18 claimant applied for and obtained a zone change when he acquired
19 the property. Nor does it allow the department to authorize the
20 claimant to use a county process in effect when he acquired the
21 property to apply for a zone change of the property.

22 (Ex 2 at 4 n2).

23 4. Petitioner alleges that the State's final order is flawed and seeks a reversal of the
24 final order. (Ex 1 at 27-28)

25 **D. Standard of review**

26 Petitioner properly has petitioned for judicial review of the State's final order under ORS
183.484, which is the portion of the Administrative Procedures Act ("APA") that governs
judicial review of orders in other than contested cases. In an ORS 183.484 proceeding, the court
determines whether a final order is supported by substantial evidence in the record and whether
the agency has correctly applied the law. ORS 183.484(5); *Powell v. Bunn*, 185 Or App 334,
339 (2002), *rev den*, 336 Or 60 (2003). The "record," for purposes of judicial review of an order
in other than contested case, is the record developed in circuit court. *Norden v. Water Resources*
Dept., 329 Or 641, 649 (2000).⁵

⁵ On January 31, 2007, the Court of Appeals issued an opinion in *Corey v. DLCD*, Case No. A129905. The petitioners in that case sought judicial review of a DLCD order opting to waive enforcement of certain land use regulations in lieu of paying compensation under Measure 37. The opinion concludes that, "under ORS 183.482, jurisdiction for judicial review lies in this court." Slip op. at 6. That conclusion is not final until the appellate judgment issues. ORS 19.450; ORAP 14.05. The appellate judgment has not been issued in *Corey* and the State plans

1 Thus, Measure 37 is concerned only with land use regulations that *currently* apply to real
2 property and that *currently* restrict its use.

3 The State adhered to these principles in assessing petitioner’s Measure 37 claim. Once it
4 determined that the claim was valid, the State issued a final order waiving “applicable provisions
5 of Goals 3 and 4, ORS 215 and OAR 660, divisions 6 and 33, enacted or adopted after
6 November 1, 1986,” to the extent necessary to allow petitioner’s desired partition of the property
7 “only to the extent that use was permitted when he acquired the property on November 1, 1986.”
8 (Ex 2 at 1). In other words, the State waived land use regulations that currently apply to the
9 property and currently restrict its use.

10 Contrary to the express language of Measure 37, petitioner argues that the State also must
11 waive certain land use regulations that are not currently enforced against him. Specifically,
12 petitioner argues that the State should have waived “the provisions of Statewide Planning Goal
13 14 and OAR 660-004-0018 and 660-004-0040 enacted after November 1, 1986.” (Petition ¶ 27).
14 He is wrong. The two administrative rules that petitioner identifies relate to the process by
15 which local governments may take exceptions to the statewide land use planning goals. The
16 term “exception” is defined by rule:

17 An exception is a decision to exclude certain land from the
18 requirements of one or more applicable statewide goals in
19 accordance with the process specified in Goal 2, Part II,
20 Exceptions. The documentation for an exception must be set forth
21 in a local government’s comprehensive plan. Such documentation
22 must support a conclusion that the standards for an exception have
23 been met. The conclusion shall be based on findings of fact
24 supported by substantial evidence in the record of the local
25 proceeding and by a statement of reasons which explain why the
26 proposed use not allowed by the applicable goal should be
provided for. The exceptions process is not to be used to indicate
that a jurisdiction disagrees with a goal.

24 OAR 660-004-0000(2). “The intent of the exceptions process is to permit necessary flexibility in
25 the application of the Statewide Planning Goals.” OAR 660-004-0000(3).

1 Petitioner contends the State should have waived OAR 660-004-0018. But that rule sets
2 out limitations on land use that still apply *after* the local government has taken an exception to a
3 statewide planning goal. The same is true of OAR 660-004-0040, which specifies how Goal 14
4 “applies to rural lands *in acknowledged exception areas* planned for residential uses.” OAR 660-
5 004-0040(1) (emphasis added). Because there is no exception to Goal 3 or Goal 4 for
6 petitioner’s property, these rules simply do not apply to that property, do not restrict petitioner’s
7 use of the property or reduce its fair market value, and, therefore, are not subject to waiver under
8 Measure 37. And Goal 14 itself, which relates to urbanization, also does not currently restrict
9 petitioner’s use of his property; it is Goals 3 and 4 and their implementing rules, as well as ORS
10 chapter 215, that presently restrict petitioner’s ability to divide that land. Because none of these
11 land use regulations presently restrict petitioner’s use of his land in a way that reduces its fair
12 market value, the State correctly decided not to waive them.

13 **B. The final order correctly does not allow petitioner to seek a zone change and**
14 **comprehensive plan amendment under the process and criteria that were in effect in**
15 **1986.**

16 Petitioner’s second complaint about the State’s final order is that it does not allow him
17 “to seek a zone change and comprehensive plan amendment under the process and criteria in
18 effect on the date that the landowner acquired the real property.” (Petition ¶ 27). It is not
19 entirely clear why petitioner has directed this complaint only against the State, and not against
20 Yamhill County, which is the entity to which any zone-change application would be directed. In
21 any event, the claim fails for two fundamental reasons.

22 First, Measure 37 is designed to give governments the choice between paying monetary
23 compensation to landowners who have valid Measure 37 claims and giving those landowners a
24 “waiver,” *i e* , “not to apply the land use regulation or land use regulations to allow the owner to
25 use the property *for a use permitted at the time the owner acquired the property.*” ORS
26 197.352(8) (emphasis added). Petitioner could not have divided his property into 2.5-acre lots
for residential development when he acquired it, and retroactively changing the zoning

1 designation to allow that use of the property would exceed the scope of waiver relief that
2 Measure 37 grants: to allow a use that was permitted at the time of acquisition.

3 Second, no state waiver authorizes the rezoning of property; rather, waivers simply
4 announce that the State will not apply certain land use regulations to allow *the current owner of*
5 the property to use it *for a particular use* permitted at the time of acquisition. See ORS
6 197.352(8). Rezoning would exceed Measure 37's mandate by allowing counties to rezone
7 property so that *any* person could put it to *any* use permitted under the new zoning designation.

8 In sum, petitioner is entitled neither to a waiver of land use regulations that do not
9 presently apply to his property nor to an order allowing him to apply for a zone change using the
10 process and criteria that were in place in 1986. Accordingly, the State is entitled to judgment as
11 a matter of law on petitioner's first, second, fourth and fifth claims for relief (Petition ¶¶ 26-34,
12 ¶¶ 35-43, ¶¶ 52-58, ¶¶ 59-65), which all are premised on petitioner's theory that he is entitled to
13 rezone the property to rural residential under the criteria that existed in 1986, and to a waiver of
14 the land-use regulations that *would* apply to his property if it were so zoned.

15 **C. The final order does not subject petitioner's property to dwelling standards that**
16 **depend on the property's predominant use in 1993.**

17 In determining whether land use regulations have restricted a claimant's use of property
18 for purposes of Measure 37, the State compares the regulations that presently affect the property
19 to those that were in place when the claimant acquired the property. That comparison generally
20 is set out in the final order. In this case, the State's discussion of current law includes the
21 following language:

22 Under OAR 660-006-0050, all the uses permitted under Goals 3
23 and 4 are allowed in mixed agricultural and forestry zones except
24 that for dwellings, either the Goal 3 or the Goal 4 standards are
25 applicable based on the predominant use of the tract on January 1,
26 1993. Depending on the predominant use of the property on
January 1, 1993, the property is subject to either the requirements
for dwellings applicable under Exclusive Farm Use (EFU) zoning
required by Goal 3 and OAR 660, division 33, or forest zone
provisions required by Goal 4 and OAR 660, division 6.

1 (Ex 2 at 7).

2 Petitioner contends that the final order does not include substantial evidence supporting
3 the “predominant use as of 1993” determination because the State’s waiver dates back to
4 November 1986. Petitioner misunderstands the significance of the quoted language. The
5 discussion of “predominant use” merely identifies what land use regulations apply to petitioner’s
6 use of his property *without* the waiver. The discussion does not relate to what regulations may
7 continue to apply to petitioner’s use of the property *with* the waiver. Indeed, the waiver order
8 says the State will not apply certain land use regulations to petitioner’s division and development
9 of the property, including “applicable provisions of * * * OAR 660, division[] 6,” except for
10 certain restrictions on dwellings that are exempt from Measure 37 because they are for “the
11 protection of public health and safety.” (Ex 2 at 10). The State is entitled to judgment on
12 petitioner’s third claim for relief (Petition ¶¶ 44-51), which is based on the “predominant use”
13 discussion because that discussion only identifies the laws that apply to petitioner’s property in
14 the absence of a waiver; it does not limit the scope of the waiver the State has issued.

15
16 **D. If the State should have granted a more comprehensive waiver, the correct remedy
is to remand the order to the respondent agencies for modification.**

17 If this Court rules in petitioner’s favor, it will then need to decide what form of relief to
18 grant, as petitioner has requested both a reversal and remand of the final order and monetary
19 compensation. As noted above, petitioner properly has brought this action as a petition for
20 judicial review pursuant to ORS 183.484. Under that APA provision, this court “may affirm,
21 reverse or remand the order” if it finds that the State erroneously interpreted Measure 37, and
22 that a correct interpretation compels a different result. ORS 183.484(5)(a). In the State’s view,
23 the only appropriate remedy in this case would be a remand to DLCDC and DAS, so those
24 agencies could decide whether to grant additional waiver relief or, instead, to give petitioner
25 monetary compensation. If the agencies chose to grant a more comprehensive waiver, petitioner
26

1 no longer would have any claim for monetary compensation, and that claim should then be
2 dismissed as moot.

3 A fundamental aspect of Measure 37 is that it authorizes *the public entity*, not the
4 claimant, to choose whether to pay compensation or to “modify, remove, or not apply” land use
5 regulations when the claimant qualifies for Measure 37 relief. ORS 197.352(8), (10). 331 Or at
6 56. The statute provides:

7 (8) Notwithstanding any other state statute or the
8 availability of funds under subsection (10) of this section, in lieu of
9 payment of just compensation under this section, the governing
10 body responsible for enacting the land use regulation may modify,
remove, or not to apply 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.

11 * * * * *

12 (10) Claims made under this section shall be paid from
13 funds, if any, specifically allocated by the legislature, city, county,
or metropolitan service district for payment of claims under this
14 section. Notwithstanding the availability of funds under this
subsection, a metropolitan service district, city, county, or state
15 agency shall have discretion to use available funds to pay claims or
to modify, remove, or not apply a land use regulation or land use
16 regulations pursuant to subsection (6) of this section. If a claim has
not been paid within two years from the date on which it accrues,
17 the owner shall be allowed to use the property as permitted at the
time the owner acquired the property.

18 ORS 197.352.

19 Thus, section 8 generally grants the public entities to which a demand for compensation
20 is submitted the option to pay or provide alternate relief. Section 10 makes it clear that the
21 option is wholly within the public entities’ discretion and applies even when a claimant brings a
22 suit for monetary compensation under ORS 197.352(6). And neither section 8 nor section 10
23 identifies any point in the administrative process – or in litigation – during which the State’s
24 right to elect the waiver remedy disappears. Rather, those provisions give the State the right to
25 elect waiver instead of compensation *at any time*. Thus, if this Court agrees with petitioner’s
26 theory that he is entitled to Measure 37 relief for regulations that would have applied to his

1 property had he obtained a zone change in 1986, the State is entitled to choose whether to grant a
2 correspondingly broader waiver, under ORS 197.352(8) and (10), or to pay petitioner monetary
3 compensation under ORS 197.352(6). As it was initially, that choice between remedies would
4 remain the State's to make.

5 **CONCLUSION**

6 The State's final order correctly applies ORS 197.352 to petitioner's Measure 37 claim.
7 The State is entitled to judgment as a matter of law on all claims and this Court should, therefore,
8 dismiss petitioner's petition for judicial review and enter judgment in the State's favor. If the
9 Court finds that the final order is flawed, it should remand the order to the respondent agencies
10 for modification.

11 DATED this ^{5th} 1 day of March, 2007.

12 Respectfully submitted,

13 HARDY MYERS
14 Attorney General

15 

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By MM

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DEPARTMENT OF JUSTICE
TRIAL DIVISION

IN THE CIRCUIT COURT OF THE STATE OF OREGON
FOR THE COUNTY OF YAMHILL

JAMES MILLER and JOYCE)
MILLER,)
)
Petitioners/Plaintiffs)
)
vs.)
)
STATE of OREGON, by and through)
The DEPARTMENT OF LAND)
CONSERVATION AND DEVELOPMENT)
and The DEPARTMENT OF)
ADMINISTRATIVE SERVICES)
)
Respondents/Defendants.)

Case No.: CV 060283

**PETITION FOR JUDICIAL
REVIEW AND MEASURE 37
COMPENSATION CLAIM**

COMES NOW Petitioners/Plaintiffs James Miller and Joyce Miller, individuals residing in the state of Oregon and in Yamhill County ("Petitioners"), by and through their attorney, Michael G. Gunn of Gunn & Cain LLP, and for their Petition for Judicial Review and cause of action under Section 6 of Ballot Measure 37 (2004), also located at ORS 197.352(6), enacted by the people of the State of Oregon, does hereby allege as follows:

1.

1
2 Respondent Department of Land Conservation and Development (“DLCD”) is
3 duly organized and existing under virtue of Oregon Revised Statute Chapter 197.

4
5 2.

6 Respondent Department of Administrative Services (“DAS”) is duly organized and
7 existing under virtue of Oregon Revised Statute Chapter 184.

8
9 3.

10 Pursuant to Oregon Administrative Rule 125-145-0030, Measure 37 claims are to
11 be submitted to DAS at 1225 Ferry Street SE, U160, Salem, Oregon 97310-4292, and
12 Measure 37 claims can not be submitted by facsimile or electronic transmission.

13
14 4.

15 Pursuant to Oregon Administrative Rule 125-145-0010 through 125-145-0105,
16 Respondent DAS has the authority to remove, modify, or not to apply the land use
17 regulations identified in a Measure 37 claim for which there is no other state officer,
18 board, commission, council, department or Division of state government (whose costs are
19 paid wholly or in part from funds held in the State Treasury) responsible for overseeing,
20 implementing and/or enforcing the land use regulation identified in the Measure 37 claim.

21
22 5.

23 Pursuant to Oregon Administrative Rule 125-145-0010 through 125-145-0105,
24 Respondent DAS has the authority to forward a Measure 37 claim to the other state
25 officer, board, commission, council, department or Division of state government (whose
26 costs are paid wholly or in part from funds held in the State Treasury), including, but not

1 limited to Respondent DLCD, responsible for overseeing, implementing and/or enforcing
2 the land use regulation identified in the Measure 37 claim.

3 6.

4 Petitioners are now and at all material times herein residents of the State of Oregon
5 and Yamhill County, Oregon.

6 7.

7
8 Petitioners are the legal and equitable owners and have legal title to 19.00 acres of
9 real property located at 17371 N.E. Slope Lane near Newberg, Oregon in Yamhill County
10 and generally described as Tax Lot R3205-0304 in Township 3 South, Range 2 West,
11 Section 5 of the Willamette Meridian and more accurately described in the legal
12 description attached hereto as Exhibit "A" (the "Real Property").

13 8.

14
15 Jurisdiction over this matter is granted to the Yamhill County Circuit Court by
16 ORS 183.484.

17 9.

18
19 Petitioner James Miller acquired the Real Property by Real Estate Contract from
20 George O. Butcher and Leonard L. Silvers dated November 1, 1986, and recorded on
21 November 7, 1986 at Film 208, Page 0701. A Statutory Special Warranty Deed, as
22 fulfillment of the Real Estate Contract, from George O. Butcher and Leonard L. Silvers
23 dated April 4, 1995, was recorded on May 8, 1995 as Instrument No. 199505678.

24
25 ///

26 ///

1 Petitioner James Miller transferred the Real Property to Petitioners James D. Miller and
2 Joyce L. Miller, Husband and Wife, by Statutory Bargain and Sale Deed dated May 2,
3 1995, and recorded on May 8, 1995 as Instrument No. 199505679.

4 10.

5 Petitioner James Miller is the applicant under the Measure 37 Claim filed with
6 DAS and DLCD. Petitioner Joyce L. Miller is an owner of the Real Property, and was
7 therefore required to sign certain parts of the Measure 37 Claim application, but is not an
8 applicant or co-applicant under the Measure 37 Claim. For purposes of convenience, and
9 because both James and Joyce Miller have a present ownership interest in the real
10 property, they are identified together herein as "Petitioners."
11

12 11.

13 On November 2, 2004, Oregon voters passed Ballot Measure 37, which provides
14 that the owner of private real property is entitled to receive just compensation when a land
15 use regulation that restricts the owner's use of the property and reduces its fair market
16 value is or was enacted by the state or local government after the owner or a family
17 member of the owner became the legal owner of the real property. Ballot Measure 37 also
18 provides that the state or local government responsible for the land use regulation may
19 choose to remove, modify or not apply the land use regulation instead of providing
20 monetary compensation to the owner.
21

22 12.

23 Ballot Measure 37 became an effective law on December 2, 2004, and was
24 codified in the Oregon Revised Statutes at ORS 197.352 (2005 edition).
25
26

13.

1
2 Respondents DAS and DLCD are charged with carrying out certain duties and
3 responsibilities as prescribed by law. Under Measure 37 and OAR 125-145-0090,
4 Defendants DAS and/or DLCD are charged with the duty to review and determine the
5 validity of Measure 37 claims filed under authority of Measure 37 that relate to state land
6 use regulations.
7

14.

8
9 On November 1, 1986, when Petitioner James Miller first acquired an ownership
10 interest in the Real Property, the Real Property was zoned and designated
11 Agricultural/Forestry District, AF-20, and thus was subject to compliance with Yamhill
12 County's acknowledged Agriculture/Forestry District then in effect, including a minimum
13 20-acre parcel size requirement.
14

15.

16 Petitioner James Miller filed his Measure 37 Claim Application with DAS on
17 August 23, 2005 ("Application"). Petitioner Joyce L. Millers signed the Application as an
18 owner of the real property, but not as an applicant. Petitioners' Application stated an
19 intent by the Petitioners to seek compensation in the amount of \$1.5 million for the
20 reduction in fair market value for the Real Property as a result of land use regulations that
21 Petitioners assert restricts the Petitioners' use of the Real Property, and specifically
22 prohibited Petitioners from dividing the Real Property into seven (7) parcels and
23 developing and building a dwelling on each parcel. Petitioners' Application requested
24 compensation or the waiver of the restrictive land use regulations, thereby allowing
25
26

1 Petitioners to divide the Real Property into seven (7) parcels and to develop and build a
2 dwelling on each parcel.

3 16.

4 Petitioners' Application stated an intent by the Petitioners to effectuate the
5 division of the Real Property into seven (7) parcels and to develop and build a dwelling on
6 each parcel by making application for a zone change and comprehensive plan amendment
7 from AF-20 to Very Low Density Residential, VLDR -2½ under the procedures and
8 criteria in effect on November 1, 1986. Petitioners maintain in the Application that the
9 zone change and comprehensive plan amendment procedures and criteria adopted and/or
10 enacted after November 1, 1986, including the provisions of Statewide Planning Goal 14
11 (Urbanization), have significantly and demonstrably restricted and limited the ability for a
12 landowner to change the zoning for real property from Agriculture/Forestry property to
13 Residential property, and thereby restricting the landowner's use of private real property
14 in a manner that reduces the fair market value of the property.
15

16 17.

17 In accordance with OAR 125-145-0090, Respondent DAS forwarded Petitioners'
18 Measure 37 Claim Application to Respondent DLCD, which then accepted Petitioners'
19 Measure 37 Claim Application. Petitioners' claim was assigned Measure 37 Claim No.
20 M122011 (the "Measure 37 Claim").
21

22 18.

23 On June 14, 2006, the DLCD issued a draft Staff Report and Recommendation
24 ("Draft Staff Report") in which the DLCD asserted that Petitioners' Measure 37 Claim
25
26

1 was valid, but that Measure 37 would not allow the uses requested by the Petitioners. A
2 copy of the Draft Staff Report is attached hereto as Exhibit "B".

3 19.

4 In its Draft Staff Report, DLCD asserted that Petitioners had requested DLCD to
5 "waive the subject property's agricultural/forestry zoning and allow the claimant to apply
6 to the county to rezone the property to a rural residential zone, using zone change criteria
7 in effect" in 1986. DLCD further asserts that Petitioners requested "that the provisions of
8 Goal 14 and OAR 660-004-0018 and 660-004-0040 that would apply to the new rural
9 residential zoning be waived as of the date the claimant acquired the property in 1986.
10 ORS 197.352 does not allow what claimant requests." *See, Footnote 2.* The DLCD Draft
11 Staff Report further determined that OAR 660-004-0018 and 660-004-0040 are not
12 applicable to the Measure 37 Claim because those rules only apply to real property which
13 has an acknowledged exception to Statewide Planning Goals 3 or 4, or both. *See,*
14 *Footnote 3.* Finally, the DLCD Draft Staff report stated that the "predominant use" of the
15 Real Property on January 1, 1993, would determine a dwelling(s) are allowed on the Real
16 Property pursuant to the permitted uses of Goal 3 and/or Goal 4. The DLCD Draft Staff
17 Report further asserted that the AF-20 zoning restrictions in place on November 1, 1986
18 limited AF-20 parcels sizes to a minimum parcel size of 20 acres, thereby preventing
19 Petitioners from using the Real Property as requested in the Measure 37 Claim.
20
21
22

23 20.

24
25 In its Draft Staff Report, the DLCD provided the Petitioners and other interested
26 parties an opportunity to comment on the Draft Staff Report. Such comments were

1 required to be in writing and were required to be delivered to the DAS in Salem, Oregon
2 within ten (10) days after the date of the Draft Staff Report.

3 21.

4 On June 26, 2006, Petitioners delivered to DAS in Salem, Oregon, Petitioners'
5 written comments with regard to the Draft Staff Report. Petitioners' written comments
6 objected to DLCD's determination that: (1) even with the requested waivers, Petitioners
7 may not be allowed to use the Real Property as desired; (2) OAR 660-004-0018 and OAR
8 660-004-0040 are not applicable to the Measure 37 Claim and that the Measure 37 Claim
9 did not address those OARs; and (3) the determination that the "predominant use" of the
10 Real Property on January 1, 1993 is applicable to or relevant to the allowed uses of the
11 Real Property on November 1, 1986. A copy of Petitioners' written comments to DAS is
12 attached hereto as Exhibit "C."
13

14 22.

15
16 In Petitioners' written comments to DAS, Petitioners stated that the Measure 37
17 Claim proposed to subdivide the property into 2½ acre parcels, thereby creating seven (7)
18 separate parcels. Petitioners further stated that, in order to obtain their objective,
19 Petitioners will have to apply to Yamhill County for a zone change for the subject
20 property from AF-20 to VLDR – 2.5, and that Petitioners' Measure 37 Claim Application
21 to both Yamhill County and the State of Oregon clearly indicated Petitioners' intent to
22 seek the zone change as part of the Measure 37 Claim. Petitioners' Measure 37 Claim
23 further stated that Petitioners' believed that the procedures and criteria to be applied by
24 Yamhill County to Petitioners' anticipated zone change application would be the
25
26

1 procedures and criteria in place on November 1, 1986. Petitioner's Measure 37 Claim
2 also sought waiver of any and all land use regulations enacted or adopted by the State of
3 Oregon after November 1, 1986, that would make approval of the zone change application
4 more difficult to obtain than if Petitioners had made such application on November 1,
5 1986.

6
7 23.

8 Petitioners' written comments to DAS further requested waiver of OAR 660-004-
9 018 (Planning and Zoning for Exception Areas) and OAR 660-004-0040 (Application of
10 Goal 14 to Rural Residential Development Areas) because Petitioners will make a request
11 for Statewide Planning Goal 3 and Goal 4 exception to the Real Property as part of
12 Petitioners' anticipated zone change request, which, as noted above, will be done under
13 the criteria and factors in place on November 1, 1986, and because as those administrative
14 rules, if applied under the standards enacted after November 1, 1986, would restrict
15 Petitioners' use of the subject property and would reduce the value of the subject property.
16

17 24.

18 Petitioners' written comments to DAS finally objected to any reference to the
19 "predominant use" of the subject property on January 1, 1993. Petitioners asserted that
20 any such date after November 1, 1986 is irrelevant to the Measure 37 claim and that any
21 applicable criteria or standards for siting a dwelling in a mixed agriculture and forest zone
22 must be the criteria or standards already enacted and adopted as of November 1, 1986.
23

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25.

1
2 On July 3, 2006, DLCD issued Final Order No. M122011, which incorporated the
3 Final Staff Report and Recommendation ("Final Order")¹. This Final Order is not an
4 order in a contested case. In the Final Order, DLCD did not change its position or its
5 recommendations and findings from the Draft Staff Report and determined that the claim
6 was valid, but that Petitioners would likely not be able to use the Real Property as
7 proposed. A copy of the Final Order is attached hereto as Exhibit "D."
8

9 FOR PETITIONERS' PETITION FOR JUDICIAL REVIEW AGAINST
10 RESPONDENT STATE OF OREGON (DLCD's and DAS' Exercise of Discretion is in
11 Violation of Statute, ORS 183.484 (5)(b)(C); ORS 197.352 does not allow Petitioners to
12 request waiver of land use regulations that would apply to Real Property if the Real
13 Property zoning in effect as of the acquisition date was different, Petitioners allege the
14 following:
15

16 26.

17 Petitioners re-allege all of the factual allegations contained in Paragraphs 1-25 of
18 this Petition for Judicial Review.
19

20 27.

21 Respondents' Final Order with regard to Petitioners' Measure 37 Claim is a
22 violation of ORS 197.352(4) and 197.352(6) with regard to the determination that ORS
23 197.352 does not allow compensation, modification, removal or waiver of the provisions
24 of Statewide Planning Goal 14 and OAR 660-004-0018 and 660-004-0040 enacted after
25

26 _____
1. The 180-day deadline for DAS and DLCD to rule on the Application was stayed and extended for the 139 days that enforcement of Measure 37 was suspended during the appeal period of *MacPhearson v.*

1 November 1, 1986, with respect to the Measure 37 Claim for the following reasons: (1)
2 ORS 197.352(1) provides that, if “a public entity enacts or enforces a new land use
3 regulation or enforces a land use regulation enacted prior to December 2, 2004, that
4 restricts the use of private real property or any interest therein and has the effect of
5 reducing the fair market value of the property, or any interest therein, the owner of real
6 property shall be paid just compensation;” (2) ORS 197.352(7) provides that in lieu of
7 payment of just compensation, “the governing body responsible for enacting the land use
8 regulation may modify, remove, or not to apply the land use regulation or land use
9 regulations to allow the owner to use the property for a use permitted at the time the
10 owner acquired the property;” (3) nothing within the text of ORS 197.352 prohibits or
11 prevents DLCD and/or DAS from waiving and electing not to apply a land use regulation
12 in effect as of the acquisition date of the property, but that would only be applicable to the
13 subject property if the property was zoned differently; and (4) nothing within the text of
14 ORS 197.352 prohibits or prevents a land owner from using Measure 37 to seek a zone
15 change and comprehensive plan amendment under the process and criteria in effect on the
16 date that the land owner acquired the real property.
17
18
19

20 28.

21 Respondents’ Final Order with regard to Petitioner’s Measure 37 Claim is a
22 violation of ORS 197.352(4) and 197.352(6) in that Respondents DLCD and DAS failed
23 to provide just compensation to Petitioners as the land use regulations cited in Petitioners’
24 Measure 37 Claim continues to be enforced against the Real Property more than 180 days
25
26

1 after Petitioners made written demand for compensation under ORS 197.352 to
2 Respondents DAS and DLCD.

3 29.

4 ORS 183.480 provides that any person adversely affected or aggrieved by an order
5 or any party to an agency proceeding is entitled to judicial review of a final order, whether
6 such order is negative or affirmative in form. ORS 183.484(1) states that jurisdiction for
7 judicial review of orders other than contested cases, as defined in ORS 183.310(2) is
8 conferred upon the circuit court for Yamhill County, and that proceedings for review
9 under this section shall be instituted by filing a petition in said court.
10

11 30.

12 ORS 197.352(6) provides that if a land use regulation continues to apply to the
13 subject property more than 180 days after the present owner of the property has made
14 written demand for compensation under this section, the present owner of the property, or
15 any interest therein, shall have a cause of action for compensation under this section in
16 circuit court in which the real property is located, and the present owner of the real
17 property shall be entitled to reasonable attorneys fees, expenses, costs, and other
18 disbursements reasonably incurred to collect the compensation.
19

20 31.

21 ORS 183.484(5)(b) provides that if the court finds the agency's exercise of
22 discretion to be in violation of a statutory provision, then the court shall remand the order
23 to the agency.
24

25 ///
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32.

1
2 Petitioners seek an order of this court remanding the Final Order pursuant to ORS
3 183.484(5)(b)(C), with instructions to DLCD and DAS to find that Measure 37 allows a
4 land owner to waive all land use regulations, including zone change and comprehensive
5 plan amendment application procedures and criteria, enacted after the property acquisition
6 date, and including any other identified land use regulations that would be made relevant
7 to the subject property by virtue of the proposed zone change and comprehensive plan
8 amendment enacted after the subject property acquisition date, and to issue a corrected
9 Final Order that provides that the State of Oregon will not apply the applicable provisions
10 of Goal 3, Goal 4, Goal 14, ORS 215, OAR 660, division 33, OAR 660-004-0018, and
11 OAR 660-004-0040 enacted or adopted after November 1, 1986, to Petitioners' Measure
12 37 Claim.
13
14

33.

15
16 By their actions as set forth above, Respondents have injured a substantial interest
17 of Petitioners as follows:
18

19 A. By determining that the even with the requested waivers, Petitioners may
20 not be allowed to use the Real Property as desired, and that Goal 14, OAR
21 660-004-0018 and OAR 660-004-0040 are not applicable to the Measure
22 37 Claim, Respondents have significantly devalued the Real Property
23 because the applicable provisions of Goal 4, OAR 660-004-0018 and 660-
24 004-0040 enacted or adopted after November 1, 1986, which would
25 continue to apply to the Real Property, prohibit Petitioners from being able
26

1 to divide the Real Property into seven (7) parcels and to develop and build
2 a dwelling on each parcel.

3 34.

4 Pursuant to ORS 183.497, Petitioners are entitled to their reasonable costs and
5 attorney fees incurred herein.

6 FOR PETITIONERS' PETITION FOR JUDICIAL REVIEW AGAINST
7 RESPONDENT STATE OF OREGON (DLCD's and DAS' Exercise of Discretion is in
8 Violation of Statute, ORS 183.484 (5)(b)(C); ORS 197.352 does not allow DLCD and/or
9 DAS to waive regulations that would have applied under a different zoning had
10 Petitioners applied for and obtained a zone change when the Real Property was acquired,
11 Petitioners allege the following:
12
13

14 35.

15 Petitioners re-allege all of the factual allegations contained in Paragraphs 1-34 of
16 this Petition for Judicial Review.

17 36.

18 Respondents' Final Order with regard to Petitioners' Measure 37 Claim is a
19 violation of ORS 197.352(4) and 197.352(6) with regard to the determination that ORS
20 197.352 does not allow DLCD and/or DAS to waive regulations that would have applied
21 to the Real Property under a different zoning had the Petitioners applied for and obtained a
22 zone change when Petitioners acquired the Real Property for the following reasons: (1)
23 ORS 197.352(1) provides that, if "a public entity enacts or enforces a new land use
24 regulation or enforces a land use regulation enacted prior to December 2, 2004, that
25
26

1 restricts the use of private real property or any interest therein and has the effect of
2 reducing the fair market value of the property, or any interest therein, the owner of real
3 property shall be paid just compensation;" (2) ORS 197.352(7) provides that in lieu of
4 payment of just compensation, "the governing body responsible for enacting the land use
5 regulation may modify, remove, or not to apply the land use regulation or land use
6 regulations to allow the owner to use the property for a use permitted at the time the
7 owner acquired the property;" (3) nothing within the text of ORS 197.352 prohibits or
8 prevents DLCD and/or DAS from waiving and electing not to apply a land use regulation
9 in effect as of the acquisition date of the property, but that would only be applicable to the
10 subject property if the property was zoned differently; and (4) nothing within the text of
11 ORS 197.352 prohibits or prevents a land owner from using Measure 37 to seek a zone
12 change and comprehensive plan amendment under the process and criteria in effect on the
13 date that the land owner acquired the real property.
14
15

16 37.

17 Respondents' Final Order with regard to Petitioner's Measure 37 Claim is a
18 violation of ORS 197.352(4) and 197.352(6) in that Respondents DLCD and DAS failed
19 to provide just compensation to Petitioner as the land use regulations cited in Petitioners'
20 Measure 37 Claim continues to be enforced against the Real Property more than 180 days
21 after Petitioners made written demand for compensation under ORS 197.352 to
22 Respondents DAS and DLCD.
23

24 ///

25 ///

38.

1
2 ORS 183.480 provides that any person adversely affected or aggrieved by an order
3 or any party to an agency proceeding is entitled to judicial review of a final order, whether
4 such order is negative or affirmative in form. ORS 183.484(1) states that jurisdiction for
5 judicial review of orders other than contested cases, as defined in ORS 183.310(2) is
6 conferred upon the circuit court for Yamhill County, and that proceedings for review
7 under this section shall be instituted by filing a petition in said court.
8

39.

9
10 ORS 197.352(6) provides that if a land use regulation continues to apply to the
11 subject property more than 180 days after the present owner of the property has made
12 written demand for compensation under this section, the present owner of the property, or
13 any interest therein, shall have a cause of action for compensation under this section in
14 circuit court in which the real property is located, and the present owner of the real
15 property shall be entitled to reasonable attorneys fees, expenses, costs, and other
16 disbursements reasonably incurred to collect the compensation.
17
18

40.

19
20 ORS 183.484(5)(b) provides that if the court finds the agency's exercise of
21 discretion to be in violation of a statutory provision, then the court shall remand the order
22 to the agency.
23

41.

24
25 Petitioners seek an order of the court remanding the Final Order pursuant to ORS
26 183.484(5)(b)(C), with instructions to DLCD and DAS to find that Measure 37 allows

1 DLCD and/or DAS to waive all land use regulations enacted after the subject property
2 acquisition date, including zone change and comprehensive plan amendment application
3 procedures and criteria, enacted after the property acquisition date, and including any
4 other identified land use regulations that would be made relevant to the subject property
5 by virtue of a proposed zone change and comprehensive plan amendment effective as of
6 the property acquisition date, and to issue a corrected Final Order that provides that the
7 State of Oregon will not apply the applicable provisions of Goal 3, Goal 4, Goal 14, ORS
8 215, OAR 660, division 33, OAR 660-004-0018, and OAR 660-004-0040 enacted or
9 adopted after November 1, 1986, to Petitioners' Measure 37 Claim.
10

11 42.

12
13 By their actions as set forth above, Respondents have injured a substantial interest
14 of Petitioners as follows:

15 A. By determining that the even with the requested waivers, Petitioners may
16 not be allowed to use the Real Property as desired, and that Goal 14, OAR
17 660-004-0018 and OAR 660-004-0040 are not applicable to the Measure
18 37 Claim, Respondents have significantly devalued the Real Property
19 because the applicable provisions of Goal 4, OAR 660-004-0018 and 660-
20 004-0040 enacted or adopted after November 1, 1986, which would
21 continue to apply to the Real Property, prohibit Petitioners from being able
22 to divide the Real Property into seven (7) parcels and to develop and build
23 a dwelling on each parcel.
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43.

Pursuant to ORS 183.497, Petitioners are entitled to their reasonable costs and attorney fees incurred herein.

FOR PETITIONERS' PETITION FOR JUDICIAL REVIEW AGAINST RESPONDENT STATE OF OREGON (Finding Not Supported by Substantial Evidence in the Whole Record, ORS 183.484 (5)(c)); the "predominant use" of the real property as of January 1, 1993, determines what permitted uses under Goal 3 and/or Goal 4 and dwelling requirements are applicable to the Measure 37 Claim, Petitioners allege the following:

44.

Petitioners re-allege all of the factual allegations contained in Paragraphs 1-43 of this Petition for Judicial Review.

45.

Petitioners allege that, pursuant to ORS 183.484(5)(c), the portion of Respondents' Final Order regarding ORS 197.352 that determines that, depending "on the predominant use on January 1, 1993," the Real Property is "subject to either the requirements for dwellings applicable under Exclusive Farm Use (EFU) zoning required by Goal 3 and OAR 660, division 33, or forest zone provisions required by Goal 4 and OAR 660, division 6" is not supported by substantial evidence in the whole record.

46.

Petitioners allege that, pursuant to ORS 183.484(5)(c), there is not substantial evidence in the record to justify Respondents' determination that depending "on the

1 predominant use on January 1, 1993,” the Real Property is “subject to either the
2 requirements for dwellings applicable under Exclusive Farm Use (EFU) zoning required
3 by Goal 3 and OAR 660, division 33, or forest zone provisions required by Goal 4 and
4 OAR 660, division 6” for the following reasons: (1) DLCD and DAS acknowledge in the
5 Final Report that Petitioner James Miller acquired the Real Property on November 1,
6 1986; (2) ORS 197.352 provides for the modification, removal or waiver (in lieu of
7 compensation) of any land use regulation enacted or adopted after the land owner acquired
8 the real property; (3) the Real Property was zone designated Agriculture/Forestry District
9 on November 1, 1986, and not Exclusive Farm Use; and (4) any dwelling or permitted use
10 requirement based upon the “predominant use” of real property as of January 1, 1993,
11 would constitute a land use regulation enacted, adopted or enforced after Petitioner James
12 Miller acquired the Real Property on November 1, 1986.
13

14
15 47.

16 Petitioners allege that, pursuant to ORS 183.484(5)(c), there is not substantial
17 evidence in the record to justify Respondents’ Final Order determination that depending
18 “on the predominant use on January 1, 1993,” the Real Property is “subject to either the
19 requirements for dwellings applicable under Exclusive Farm Use (EFU) zoning required
20 by Goal 3 and OAR 660, division 33, or forest zone provisions required by Goal 4 and
21 OAR 660, division 6” because: (1) Petitioner James Miller acquired the Real Property on
22 November 1, 1986, almost 6.5 years before the “predominant use” of the Real Property as
23 of January 1, 1993 could be determined; (2) DLCD failed to establish the existence of any
24 land use regulation or law in effect as of November 1, 1986, that provided that the
25
26

1 permitted uses and/or dwelling requirements for the Real Property depended upon the
2 “predominant use” of the Real Property as of January 1, 1993; and (3) that the Real
3 Property was subject to the Exclusive Farm Use zoning requirements on November 1,
4 1986.

5 48.

6
7 By their actions as set forth above, Respondents have injured a substantial interest
8 of Petitioners as follows:

9 A. By determining that the “predominant use” of the Real Property as of
10 January 1, 1993, is a condition to determine the permitted uses and the
11 requirements for dwellings on the Real Property, Respondents have
12 significantly devalued the Real Property because this requirement is based
13 upon a date and conditions that did not come into existence until after the
14 Petitioner James Miller acquired the Real Property and which likely
15 prohibit Petitioners from being able to divide the Real Property into seven
16 (7) parcels and to develop and build a dwelling on each parcel.

17
18 B. By determining that the Real Property was subject to the Exclusive Farm
19 Use zoning requirements, and not the Agriculture/Forestry District
20 requirements, on November 1, 1986, Respondents have significantly
21 devalued the Real Property because this Exclusive Farm Use zoning
22 requirements are significantly different from the Agriculture/Forestry
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District requirements likely prohibit Petitioners from being able to divide the Real Property into seven (7) parcels and to develop and build a dwelling on each parcel.

49.

ORS 183.484(5)(c) provides that if the court finds the agency's order is not supported by substantial evidence in the record, then the court shall set aside or remand the order to the agency.

50.

Petitioners seek an order of this court setting aside or remanding the Final Order pursuant to ORS 183.484(5)(b)(C), with instructions to DLCD and DAS to: (1) remove any and all references and findings that, depending upon the "predominant use" on January 1, 1993, the Real Property is subject to either the requirements for dwellings applicable under Exclusive Farm Use (EFU) zoning required by Goal 3 and OAR 660, division 33, or forest zone provisions required by Goal 4 and OAR 660, division 6; (2) remove all references to Exclusive Farm Use district and replace them with Agriculture/Forestry District, and to issue a corrected Final Order that provides that the State of Oregon will not apply the applicable provisions of Goal 3, Goal 4, Goal 14, ORS 215, OAR 660, division 33, OAR 660-004-0018, and OAR 660-004-0040 enacted or adopted after November 1, 1986, to Petitioners' Measure 37 Claim.

51.

Pursuant to ORS 183.497, Petitioners are entitled to their reasonable costs and attorney fees incurred herein.

1 FOR PETITIONERS' PETITION FOR JUDICIAL REVIEW AGAINST
2 RESPONDENT STATE OF OREGON (Erroneously Interpreting a Provision of Law,
3 ORS 183.484 (5)(a)); - ORS 197.352 does not allow DLCD and/or DAS to waive
4 regulations that would have applied under a different zoning had Petitioners applied for
5 and obtained a zone change when the Real Property was acquired, Petitioners allege the
6 following:
7

8 52.

9 Petitioners re-allege all of the factual allegations contained in Paragraphs 1-51 of
10 this Petition for Judicial Review.

11 53.

12
13 Petitioners allege that, pursuant to ORS 183.484(5)(a), the portion of Respondents'
14 Final Order determining that ORS 197.352 does not allow DLCD and/or DAS to waive
15 regulations that would have applied under a different zoning had Petitioners applied for
16 and obtained a zone change when the Real Property was acquired is an erroneous
17 interpretation of the law.
18

19 54.

20 Petitioners allege that, pursuant to ORS 183.484(5)(a), Respondents erred in
21 erroneously interpreting the law in the Final Order by granting Petitioners' Measure 37
22 Claim but determining that ORS 197.352 does not allow DLCD and/or DAS to waive
23 regulations that would have applied under a different zoning had Petitioners applied for
24 and obtained a zone change when the Real Property was acquired, because: (1) ORS
25 197.352(1) provides that, if "a public entity enacts or enforces a new land use regulation
26

1 or enforces a land use regulation enacted prior to December 2, 2004, that restricts the use
2 of private real property or any interest therein and has the effect of reducing the fair
3 market value of the property, or any interest therein, the owner of real property shall be
4 paid just compensation;" (2) ORS 197.352(7) provides that in lieu of payment of just
5 compensation, "the governing body responsible for enacting the land use regulation may
6 modify, remove, or not to apply the land use regulation or land use regulations to allow
7 the owner to use the property for a use permitted at the time the owner acquired the
8 property;" (3) nothing within the text of ORS 197.352 prohibits or prevents DLCD and/or
9 DAS from waiving and electing not to apply a land use regulation in effect as of the
10 acquisition date of the property, but that would only be applicable to the subject property
11 if the property was zoned differently; and (4) nothing within the text of ORS 197.352
12 prohibits or prevents a land owner from using Measure 37 to seek a zone change and
13 comprehensive plan amendment under the process and criteria in effect on the date that
14 the land owner acquired the real property.
15
16

17 55.

18
19 Petitioners allege that, pursuant to ORS 183.484(5)(a), DLCD and DAS
20 erroneously interpreted a provision of law by determining that ORS 197.352 does not
21 allow DLCD and/or DAS to waive regulations that would have applied under a different
22 zoning had Petitioners applied for and obtained a zone change when the Real Property
23 was acquired, because there is no statutory authority for Respondents' Final Order
24 determination to that effect.
25

26 ///

56.

1
2 By their actions as set forth above, Respondents have injured a substantial interest
3 of Petitioners as follows:

4 A. By determining that determining that ORS 197.352 does not allow DLCD
5 and/or DAS to waive regulations that would have applied under a different
6 zoning had Petitioners applied for and obtained a zone change when the
7 Real Property was acquired, Respondents have significantly devalued the
8 Real Property because the applicable provisions of Goal 4, OAR 660-004-
9 0018 and 660-004-0040 enacted or adopted after November 1, 1986,
10 which would continue to apply to the Real Property, prohibit Petitioners
11 from being able to divide the Real Property into seven (7) parcels and to
12 develop and build a dwelling on each parcel.
13
14

15 57.

16 ORS 183.484(5)(a) provides that if the court finds the agency has erroneously
17 interpreted the law, then the court shall set aside or remand the order to the agency.
18

19 58.

20 Petitioners seek an order of this court setting aside or remanding the Final Order
21 pursuant to ORS 183.484(5)(a), with instructions to DLCD and DAS to find that Measure
22 37 allows a land owner to waive all land use regulations, including zone change and
23 comprehensive plan amendment application procedures and criteria, enacted after the
24 property acquisition date, and including any other identified land use regulations that
25 would be made relevant to the subject property by virtue of the proposed zone change and
26

1 comprehensive plan amendment enacted after the subject property acquisition date, and to
2 issue a corrected Final Order that provides that the State of Oregon will not apply the
3 applicable provisions of Goal 3, Goal 4, Goal 14, ORS 215, OAR 660, division 33, OAR
4 660-004-0018, and OAR 660-004-0040 enacted or adopted after November 1, 1986, to
5 Petitioners' Measure 37 Claim.

6
7 59.

8 Pursuant to ORS 183.497, Petitioners are entitled to their reasonable costs and
9 attorney fees incurred herein.

10 FOR PETITIONERS' CAUSE OF ACTION UNDER MEASURE 37 AGAINST
11 RESPONDENT STATE OF OREGON, Petitioners allege the following:

12
13 60.

14 Petitioners re-allege all of the factual allegations contained in Paragraphs 1-59 of
15 this Petition for Judicial Review.

16
17 61.

18 Petitioners have made written demand for compensation or waiver of land use
19 regulations in a timely manner under ORS 197.352. More than 180 days have passed
20 since Petitioners made written demand for compensation or waiver of restrictive land use
21 regulations. Respondents' Final Order has wrongfully determined that Measure 37 does
22 not allow a land owner to waive all land use regulations, including zone change and
23 comprehensive plan amendment application procedures and criteria, enacted after the
24 property acquisition date, and including any other identified land use regulations that
25 would be made relevant to the subject property by virtue of the proposed zone change and
26

1 comprehensive plan amendment enacted after the subject property acquisition date, and
2 that the provisions of Goal 14, OAR 660-004-0018, and OAR 660-004-0040 enacted or
3 adopted after November 1, 1986, are not applicable to Petitioners' Measure 37 Claim.
4 Based upon these wrongful determinations, Respondents DAS and DLCD have
5 wrongfully limited Petitioners' Measure 37 Claim and have denied Petitioners' Measure
6 37 Claim for all practical purposes. See Exhibit C. Respondents' actions in continuing to
7 apply their erroneous interpretation of Measure 37 and alleged land use regulations
8 enacted or adopted subsequent to November 1, 1986 results in a reduction of the fair
9 market value of the Real Property in an amount of \$1,500,000.00.
10

11 62.

12
13 ORS 197.352(6) provides that where Respondents continue to apply their
14 restrictive land use regulations, a cause of action for compensation lies with the present
15 property owner. Respondents' Final Order denying Petitioner's Measure 37 Claim
16 indicates their present intent to continue to apply restrictive state land use regulations to
17 the Real Property. As such, Petitioners are entitled to compensation for Respondents'
18 actions.
19

20 63.

21 Petitioners are entitled to just compensation in the amount of \$1,500,000.00 which
22 represents the reduction in fair market value to the Real Property from the enactment
23 and/or enforcement of restrictive state land use regulations as of August 23, 2005, which
24 is the date Petitioners filed their Measure 37 Claim with Respondents.
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64.

Pursuant to ORS 197.352(6), Petitioners are entitled to be reimbursed for all of their attorney's fees, expenses, costs and other disbursements reasonably incurred in this matter, and to otherwise collect the just compensation due to them.

65.

Petitioners have no other plain, speedy, and adequate remedy for the review prayed for herein.

WHEREFOR, Petitioners pray for a judgment of this Court against Respondents in this matter in the following particulars:

1. For judgment of this court reversing the action taken by Respondents in Final Order No. M122011, and finding that Petitioners' Measure 37 Claim is valid for all purposes; and
2. For judgment of this court remanding the action taken by Respondents in Final Order No. M122011 as a violation of ORS 197.352(1) and ORS 197.352(6) in that Respondents have erroneously determined that Measure 37 does not allow a land owner to waive all land use regulations, including zone change and comprehensive plan amendment application procedures and criteria, enacted after the property acquisition date, and including any other identified land use regulations that would be made relevant to the subject property by virtue of the proposed zone change and comprehensive plan amendment enacted after the subject property acquisition

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- 1 date, and that the provisions of Goal 14, OAR 660-004-0018, and OAR 660-004-
2 0040 enacted or adopted after November 1, 1986, are not applicable to Petitioners'
3 Measure 37 Claim; and
- 4 3. For an award of just compensation to Petitioners in the amount of \$1,500,000.00
5 for the reduction in fair market value of their Real Property, which results from the
6 enforcement of restrictive state land use regulations; and
7
- 8 4. For an award to Petitioners for all of their reasonable attorney's fees, expenses,
9 costs, and other disbursements incurred in this action pursuant to both Measure 37
10 and ORS 183.497, and to otherwise collect the just compensation that is awarded
11 by this court; and
12
- 13 5. For such further and different relief as this court deems just and equitable.
- 14 DATED this 29 day of August 2006.

15
16 By: Charles Harrell
17 Michael G. Gunn, OSB No. 82154
18 Charles E. Harrell, OSB No. 01276
19 Attorneys for Petitioners
20 Gunn & Cain LLP
21 P.O. Box 1046
22 Newberg, Oregon 97132
23 (503) 538-8318
24 gunn@gunn-cain.com
25
26

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. M122011
(BALLOT MEASURE 37) OF)
James Miller, CLAIMANT)

Claimant: James Miller (the Claimant)

Property: Township 3S, Range 2W, Section 05, Tax lot 304, Yamhill County (the Property)

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

Claimant submitted the Claim to the State of Oregon under ORS 197.352. Under OAR 125-145-0010 *et seq.*, the Department of Administrative Services (DAS) referred the Claim to the Department of Land Conservation and Development (DLCDC) 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 DLCDC (the DLCDC Report) attached to and by this reference incorporated into this order.

ORDER

The Claim is approved as to laws administered by DLCDC and the Land Conservation and Development Commission (LCDC) for the reasons set forth in the DLCDC 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 James Miller's division of the 19-acre property into seven parcels or to his development of a dwelling on each resulting undeveloped parcel: applicable provisions of Goals 3 and 4, ORS 215 and OAR 660, divisions 6, and 33, enacted or adopted after November 1, 1986. These land use regulations will not apply to the claimant only to the extent necessary to allow him to use the subject property for the use described in this report, and only to the extent that use was permitted when he acquired the property on November 1, 1986. The department acknowledges that the relief to which the claimant is entitled under ORS 197.352 will likely not allow the claimant to use the property to the extent desired by the claimant, as described in this report.
2. The action by the State of Oregon provides the state's authorization to the claimant to use the property for the use described in this report, subject to the standards in effect on November 1, 1986. On that date, the property was subject to compliance with Yamhill County's acknowledged EFU zone, and the applicable provisions of ORS 215 and OAR 660, then in effect.


3. To the extent that any law, order, deed, agreement or other legally enforceable public or private requirement provides that the subject property may not be used without a permit, license or other form of authorization or consent, the order will not authorize the use of the property unless the claimant first obtains that permit, license or other form of authorization or consent. Such requirements may include, but are not limited to: a building permit, a land use decision, a "permit" as defined in ORS 215.402 or 227.160, other permits or authorizations from local, state or federal agencies and restrictions on the use of the subject property imposed by private parties.

4. Any use of the property by the claimant under the terms of the order will remain subject to the following laws: (a) those laws not specified in (1) above; (b) any laws enacted or enforced by a public entity other than the Commission or the department; and (c) those laws not subject to ORS 197.352 including, without limitation, those laws exempted under ORS 197.352(3).

5. Without limiting the generality of the foregoing terms and conditions, in order for the claimant to use the subject property, it may be necessary for him to obtain a decision under ORS 197.352 from a city and/or county and/or metropolitan service district that enforces land use regulations applicable to the property. Nothing in this order relieves the claimant from the necessity of obtaining a decision under ORS 197.352 from a local public entity that has jurisdiction to enforce a land use regulation applicable to a use of the subject property by the claimant.

This Order is entered by the Director of the DLCD as a final order of DLCD and the Land Conservation and Development Commission under ORS 197.352, OAR 660-002-0010(8), and OAR 125, division 145, and by the Deputy 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
DLCD

Dated this 3rd day of July, 2006.

FOR the DEPARTMENT OF ADMINISTRATIVE
SERVICES:



Dugan Petty, Deputy Administrator
DAS, State Services Division
Dated this 3rd day of July, 2006.

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 197.352¹, 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."

¹ By order of the Marion County Circuit Court, "all time lines under Measure 37 [were] suspended indefinitely" on October 25, 2005. This suspension was lifted on March 13, 2006 by the court. As a result, a period of 139 days (the number of days the time lines were suspended) has been added to the 180-day time period under ORS 197.352(6) for claims that were pending with the state on October 25, 2005.

ORS 197.352 (BALLOT MEASURE 37) CLAIM FOR COMPENSATION
OREGON DEPARTMENT OF LAND CONSERVATION AND DEVELOPMENT
Final Staff Report and Recommendation

July 3, 2006

STATE CLAIM NUMBER: M122011

NAME OF CLAIMANT: James Miller

MAILING ADDRESS: PO Box 1045
Newberg, Oregon 97132

PROPERTY IDENTIFICATION: Township 3S, Range 2W, Section 05
Tax lot 304
Yamhill County

OTHER CONTACT INFORMATION: Michael G. Gunn
PO Box 1046
Newberg, Oregon 97132

OTHER INTEREST IN PROPERTY: Joyce Miller (owner, non-claimant)
Nick and Susan Giesch (easement)

DATE RECEIVED BY DAS: August 23, 2005

180-DAY DEADLINE: July 8, 2006¹

I. SUMMARY OF CLAIM

The claimant, James Miller, seeks compensation in the amount of \$1.5 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 claimant desires compensation or the right to divide the 19-acre property into seven parcels and to develop a dwelling on each resulting undeveloped parcel.² The

¹ This date reflects 180 days from the date the claim was submitted as extended by the 139 days enforcement of Measure 37 was suspended during the pendency of the appeal of *MacPherson v Dept. of Admin. Svcs.*, 340 Or 117 (2006).

² After notification was provided pursuant to OAR 125-145-0080 on June 14, 2006, the claimant's attorney submitted a letter, dated June 26, 2006, to clarify that, in addition to the desired use as described in this report, the claimant requests that the department waive the subject property's agriculture/forestry zoning and allow the claimant to apply to the county to rezone the property to a rural residential zone, using the zone change criteria in effect when he acquired the property in 1986. Further, in anticipation of the county granting the zone change using the 1986 process, the claimant requests that the provisions of Goal 14 and OAR 660-004-0018 and 660-004-0040 that would apply to the new rural residential zoning be waived as of the date the claimant acquired the property in 1986. ORS 197.352 does not allow what the claimant requests. By its terms, ORS 197.352 does not remove zoning or

subject property is located at 17371 Northeast Slope Lane, near Newberg, in Yamhill County.
(See claim)

II. SUMMARY OF STAFF RECOMMENDATION

Based on the findings and conclusions set forth below, the Department of Land Conservation and Development (the department) has determined that the claim is valid. Department staff recommends that, in lieu of compensation, the requirements of the following state laws enforced by the Land Conservation and Development Commission (the Commission) or the department not apply to James Miller's division of the 19-acre property into seven parcels and to his development of a dwelling on each resulting undeveloped parcel: applicable provisions of Statewide Planning Goals 3 (Agricultural Lands) and 4 (Forest Lands), ORS 215 and Oregon Administrative Rules (OAR) 660, divisions 6, and 33, enacted or adopted after November 1, 1986. These laws will not apply to the claimant only to the extent necessary to allow him to use the subject property for the use described in this report, and only to the extent that use was permitted when he acquired the property on November 1, 1986. The department acknowledges that the relief to which the claimant is entitled under ORS 197.352 will likely not allow the claimant to use the subject property to the extent desired by the claimant, as described in this report. (See the complete recommendation in Section VI of this report.)

III. COMMENTS ON THE CLAIM

Comments Received

On October 17, 2005, pursuant to OAR 125-145-0080, the Oregon Department of Administrative Services (DAS) provided written notice to the owners of surrounding properties. According to DAS, no written comments, evidence or information 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

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 regulations to allow the owner to use the property for a use permitted at the time the owner acquired the property." It does not allow the department to waive laws that would have applied under a different zone, had the claimant applied for and obtained a zone change when he acquired the property. Nor does it allow the department to authorize the claimant to use a county process in effect when he acquired the property to apply for a zone change of the property.

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 August 23, 2005, for processing under OAR 125, division 145. A supplement to the claim identifies Goals 3 and 4, several provisions of ORS 215 and OAR 660-004-0018 and 660-004-0040 as the basis for the claim. Only laws that were enacted or adopted prior to December 2, 2004, are the basis for this claim.

Conclusions

The claim has been submitted within two years of the effective date of Measure 37 (December 2, 2004), based on land use regulations enacted or adopted prior to December 2, 2004, and is therefore timely filed.

V. ANALYSIS OF CLAIM

1. Ownership

ORS 197.352 provides for payment of compensation or relief from specific laws for "owners" as that term is defined in ORS 197.352. ORS 197.352(11)(C) defines "owner" as "the present owner of the property, or any interest therein."

Findings of Fact

The claimant, James Miller, acquired the subject property on November 1, 1986, as reflected by a contract included with the claim. The Yamhill County Assessor's Office confirms the claimant's current ownership of the subject property.

Conclusions

The claimant, James Miller, is an "owner" of the subject property as that term is defined by ORS 197.352(11)(C), as of November 1, 1986.

2. The Laws That are the Basis for This Claim

In order to establish a valid claim, ORS 197.352(1) requires, in part, that a law must restrict the claimant's use of private real property in a manner that reduces the fair market value of the property relative to how the property could have been used at the time the claimant or a family member acquired the property.

Findings of Fact

The claim indicates that the claimant desires to divide the 19-acre subject property into seven parcels and to develop a dwelling on each resulting undeveloped parcel. It identifies current state and local land use regulations as not allowing the desired use.³

The claim is based generally on Yamhill County's current Agriculture/Forestry (AF-20) zone and the applicable provisions of state law that require such zoning. The claimant's property is zoned AF-20, which is a mixed agricultural and forest land zone, as required by Goal 4 and the implementing provisions of OAR 660, division 6 (effective on February 5, 1990), subsequently amended on March 1, 1994, to comply with the provisions of House Bill 3661 (Chapter 792, Oregon Laws 1993).

Under OAR 660-006-0050, all the uses permitted under Goals 3 and 4 are allowed in mixed agriculture and forest zones except that for dwellings, either the Goal 3 or 4 standards are applicable based on the predominant use of the tract on January 1, 1993.⁴ Depending on the predominant use on January 1, 1993, the property is subject to either the requirements for dwellings applicable under Exclusive Farm Use (EFU) zoning required by Goal 3 and OAR 660, division 33, or forest zone provisions required by Goal 4 and OAR 660, division 6.

For land divisions, OAR 660-006-0055 authorizes the creation of new parcels based on the standards applicable to farm or forest zones that implement the minimum lot size specified in ORS 215.780. Under ORS 215.780(2)(a), the minimum lot size in Yamhill County's AF-20 zone is 20 acres. The claimant's property cannot be divided into parcels smaller than 20 acres.

The claimant acquired the subject property on November 1, 1986. At that time, the property was subject to Yamhill County's acknowledged AF-20 zone, which generally required a minimum lot or parcel size of 20 acres.⁵ When the claimant acquired the subject property, the desired division and development of the property would have been governed by the county's AF-20 zone and the applicable provisions of ORS 215 then in effect.⁶ In 1986, ORS 215.263 (1985 edition) required

³ The claimant cites OAR 660-004-0018 (Planning and Zoning for Exception Areas) and 660-004-0040 (Application of Goal 14 to Rural Residential Areas) as applicable to this claim, but does not establish how these regulations apply to or restrict the use of the subject property. By their terms, these rules apply only to land for which there is an acknowledged exception to Goal 3 or 4, or both. Yamhill County has not approved such an exception for the subject property. Since these administrative rules do not apply to the subject property, they are not addressed further in this report. Further, as discussed above, ORS 197.352 does not allow the department to waive requirements that do not apply to the property, but which would have applied had the claimant obtained a zone change when the claimant acquired the property when he acquired it.

⁴ No information was provided to the department regarding the predominant use of the subject property on January 1, 1993.

⁵ Yamhill County's AF-20 zone was acknowledged by the Commission for compliance with Goals 3 and 4 on June 12, 1980. The claimant asserts that the subject property was zoned AF-10 (10-acre minimum lot or parcel size) when he acquired it. However, Yamhill County has confirmed that the property was subject to the county's acknowledged AF-20 zone when the claimant acquired the property on November 1, 1986.

⁶ 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

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 sized in the county's acknowledged plan. ORS 215.283(1)(f) (1985 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.

No information has been presented in the claim to establish whether the claimant's desired use of the subject property would have been permitted under the county's acknowledged plan and the applicable provisions of ORS 215 in effect when the claimant acquired the property.

Conclusions

The current zoning requirements, minimum lot size and dwelling standards established by Goals 3 and 4, ORS 215 and OAR 660, divisions 6, and 33, were enacted or adopted after the claimant acquired the subject property in 1986. However, the claim does not establish whether or to what extent the claimant's desired use of the subject property complies with the standards under Yamhill County's acknowledged AF-20 zone and the applicable provisions of ORS 215 in effect when the claimant acquired the property on November 1, 1986. It is unlikely that the extent of the claimant's desired use could have satisfied the standards in effect when he acquired the property

This report addresses only those state laws that are identified in the claim, or that the department is certain apply to the subject property based on the use that the claimant has identified. There may be other laws that currently apply to the claimant's use of the subject property, and that may continue to apply to the claimant's use of the property, that have not been identified in the claim. In some cases, it will not be possible to know which laws apply to a use of the subject property until there is a specific proposal for that use. When the claimant seeks a building or development permit to carry out a specific use, it may become evident that other state laws apply to that use.

3. Effect of Regulations on Fair Market Value

In order to establish a valid claim, ORS 197.352(1) requires that the land use regulation(s) (described in Section V.(2) of this report) must have "the effect of reducing the fair market value of the property, or any interest therein."

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)

Findings of Fact

The claim includes an estimate of \$1.5 million as the reduction in the subject property's fair market value due to the regulations. This amount is based on the claimant's assessment of the subject property's fair market value.

Conclusions

As explained in Section V.(1) of this report, the claimant is James Miller who acquired the subject property on November 1, 1986. Under ORS 197.352, the claimant is due compensation for land use regulations that restrict the use of the subject property and have the effect of reducing its fair market value. Based on the findings and conclusions in Section V.(2) of this report, laws enacted or adopted since the claimant acquired the subject property restrict the claimant's desired use of the property. The claimant estimates that the effect of the regulations on the fair market value of the subject property is a reduction of \$1.5 million.

Without an appraisal or other relevant evidence, and without verification of whether or the extent to which the claimant's desired use of the subject property was allowed under the standards in effect when he acquired the property, it is not possible to substantiate the specific dollar amount by which the land use regulations have reduced the property's fair market value. 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 Goals 3 and 4, ORS 215 and OAR 660, divisions 6, and 33, which Yamhill County has implemented through its current AF-20 zone. With the exception of amendments to ORS 215 and OAR 660 enacted or adopted after November 1, 1986, these land use regulations were in effect when the claimant acquired the subject property.

Conclusions

Without a specific development proposal for the subject property, it is not possible for the department to determine all the laws that may apply to a particular use of the property, or whether those laws may fall under one or more of the exemptions under ORS 197.352. It appears that the general statutory, goal and rule restrictions on the division and development of the subject property are not exempt under ORS 197.352(3)(E) only to the extent they were enacted or adopted after the claimant acquired the property on November 1, 1986. Provisions of

ORS 215 and OAR 660 in effect when the claimant acquired the subject property in 1986 are exempt under ORS 197.352(3)(E) and will continue to apply to the property.

Other laws in effect when the claimant acquired the subject property are also exempt under ORS 197.352(3)(E) and will also continue to apply to the claimant's use of the property. In addition, the department notes that ORS 215.730 and OAR 660, division 6, include standards for siting dwellings in forest zones. Those provisions include fire protection standards for dwellings. 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, siting standards for dwellings 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 claimant's 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 subject property until there is a specific proposal for that use. When the claimant seeks a building or development permit to carry out a specific use, it may become evident that other state laws apply to that use. In some cases, some of these laws may be exempt under ORS 197.352(3)(A) to (D).

This report addresses only those state laws that are identified in the claim, or that the department is certain apply to the subject property, based on the use that the claimant has identified. Similarly, this report only addresses the exemptions provided for under ORS 197.352(3) that are clearly applicable, given the information provided to the department in the claim. The claimant should be aware that the less information he has provided to the department in the claim, the greater the possibility that there may be additional laws that will later be determined to continue to apply to his use of the subject property.

VI. FORM OF RELIEF

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

Findings of Fact

Based on the findings and conclusions set forth in this report, laws enforced by the Commission or the department restrict the claimant's desired use of the subject property. The claim asserts that existing state land use regulations enforced by the Commission or the department reduce the fair market value of the subject property by \$1.5 million. 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 claimant's desired use of the property was allowed under the standards in effect when he acquired the property. Nevertheless, based on the record for this claim, the department has determined that the laws on which the claim is based have reduced the fair market value of the 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 James Miller to use the subject property for a use permitted at the time he acquired the property on November 1, 1986.

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 James Miller's division of the 19-acre property into seven parcels or to his development of a dwelling on each resulting undeveloped parcel: applicable provisions of Goals 3 and 4, ORS 215 and OAR 660, divisions 6, and 33, enacted or adopted after November 1, 1986. These land use regulations will not apply to the claimant only to the extent necessary to allow him to use the subject property for the use described in this report, and only to the extent that use was permitted when he acquired the property on November 1, 1986. The department acknowledges that the relief to which the claimant is entitled under ORS 197.352 will likely not allow the claimant to use the property to the extent desired by the claimant, as described in this report.
2. The action by the State of Oregon provides the state's authorization to the claimant to use the property for the use described in this report, subject to the standards in effect on November 1, 1986. On that date, the property was subject to compliance with Yamhill County's acknowledged EFU zone, and the applicable provisions of ORS 215 and OAR 660, then in effect.
3. To the extent that any law, order, deed, agreement or other legally enforceable public or private requirement provides that the subject property may not be used without a permit, license or other form of authorization or consent, the order will not authorize the use of the property unless the claimant first obtains that permit, license or other form of authorization or consent. Such requirements may include, but are not limited to: a building permit, a land use decision, a "permit" as defined in ORS 215.402 or 227.160, other permits or authorizations from local, state or federal agencies and restrictions on the use of the subject property imposed by private parties.
4. Any use of the property by the claimant under the terms of the order will remain subject to the following laws: (a) those laws not specified in (1) above; (b) any laws enacted or enforced by a public entity other than the Commission or the department; and (c) those laws not subject to ORS 197.352 including, without limitation, those laws exempted under ORS 197.352(3).

5. Without limiting the generality of the foregoing terms and conditions, in order for the claimant to use the subject property, it may be necessary for him to obtain a decision under ORS 197.352 from a city and/or county and/or metropolitan service district that enforces land use regulations applicable to the property. Nothing in this order relieves the claimant from the necessity of obtaining a decision under ORS 197.352 from a local public entity that has jurisdiction to enforce a land use regulation applicable to a use of the subject property by the claimant.

VII. COMMENTS ON THE DRAFT STAFF REPORT

The department issued its draft staff report on this claim on June 14, 2006. 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. Comments received have been taken into account by the department in the issuance of this final report

1 **CERTIFICATE OF SERVICE**

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3 I certify that on March 15th, 2007, I served the foregoing TRIAL MEMORANDUM upon
4 the parties hereto by the method indicated below, and addressed to the following:

5
6 Charles E. Harrell
7 Michael G. Gunn
8 Gunn & Cain LLP
P.O. Box 1046
Newberg, OR 97132

___ HAND DELIVERY
___ MAIL DELIVERY
 OVERNIGHT MAIL
___ TELECOPY (FAX)

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