

HARDY MYERS  
Attorney General



PETER D. SHEPHERD  
Deputy Attorney General

**DEPARTMENT OF JUSTICE**  
TRIAL DIVISION

January 25, 2007

Circuit Court Clerk's Office  
Josephine County Courthouse  
500 N.W. 6th, Room 256  
Grants Pass, Oregon 97526

Re: *Pondelick et al v. Josephine Co. et al*  
Josephine County Circuit Court No. 06CV0622

Dear Circuit Court Clerk:

Enclosed for filing please find the State Respondents' Motion to Strike and Memorandum in Support of State Respondents' Motion to Strike in the referenced matter. The Court already has issued a letter opinion on a similar motion to strike filed by Josephine County.

Postcards are enclosed for your use in notifying me of the action taken.

Sincerely,

Erika L. Hadlock  
Sr. Assistant Attorney General

TRIQ6935.DOC/ELH/tr1

Enclosures

cc: Walter L. Cauble  
Steven E. Rich  
Client

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

ROY A. PONDELICK and TANA  
PONDELICK, Trustees of the Roy A.  
Pondelick and Tana Pondelick Revocable  
Living Trust and NEAL A. PONDELICK,  
Trustee of the Neal A. Pondelick Revocable  
Trust,,

Petitioners,

v.

JOSEPHINE COUNTY and STATE OF  
OREGON, DEPARTMENT OF LAND  
CONSERVATION AND DEVELOPMENT,  
DEPARTMENT OF ADMINISTRATIVE  
SERVICES,

Respondents.

Case No. 06-CV-0622  
STATE RESPONDENTS' MOTIONS TO  
STRIKE

Pursuant to ORCP 21 E, respondents State of Oregon, Department of Land Conservation  
and Development, and Department of Administrative Services (collectively, "the State") move to  
strike petitioners' third and fourth claims for relief to the extent they are brought against the  
State. The court lacks subject matter jurisdiction over those claims and petitioners have not  
pleaded ultimate facts sufficient to state claims for relief. In support of this motion, the State  
relies on ORCP 21 E, ORS 197.352, the Oregon Administrative Procedures Act ("APA"), the  
files and record of this case, and the supporting memorandum filed concurrently.

1 Counsel for the parties have conferred in good faith about the issues presented by these  
2 motions but have been unable to resolve the dispute.

3 DATED this 25<sup>th</sup> day of January, 2007.

4 Respectfully submitted,

5 HARDY MYERS  
6 Attorney General

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14 Of Attorneys for State of Oregon

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OREGON, DEPARTMENT OF LAND  
CONSERVATION AND DEVELOPMENT,  
DEPARTMENT OF ADMINISTRATIVE  
SERVICES,

Respondents.

Case No. 06-CV-0622

MEMORANDUM IN SUPPORT OF STATE  
RESPONDENTS' MOTION TO STRIKE

**INTRODUCTION**

After the people enacted Ballot Measure 37 in 2004, the State of Oregon implemented procedures for processing the thousands of claims that have followed. Those procedures, described in detail in the next section of this memorandum, result in a final agency order either denying or approving each Measure 37 claim and, when appropriate, granting relief in the form of a "waiver" of certain land use regulations. Those orders – like other final agency orders – are subject to judicial review under the Oregon Administrative Procedures Act ("APA") pursuant to ORS 183.484.

In some cases, however, a Measure 37 claimant who is dissatisfied with the agency order chooses to seek monetary compensation in circuit court, either instead of or in addition to filing an APA petition for judicial review. That is the approach petitioners have taken in challenging

1 the State’s decision on their Measure 37 claim. In addition to a petition for judicial review of the  
2 final order, petitioners’ petition includes a Declaratory Judgment Act (“DJA”) claim and a claim  
3 for monetary compensation under section 6 of Measure 37. The same petition includes writ-of-  
4 review, DJA and Measure 37 claims against Josephine County.

5 Josephine County already has moved against the petition and this Court has issued a letter  
6 opinion explaining why it agrees with the County’s argument that petitioners could not properly  
7 bring DJA and Measure 37 claims once they chose to challenge the County’s decision on their  
8 Measure 37 claim by writ of review. Under this Court’s ruling, petitioners can proceed against  
9 the County only pursuant to the writ of review.

10 The State now moves this court for an order striking the petitioners’ DJA and Measure 37  
11 claims to the extent they are brought against the State. As explained below, the APA provides  
12 the exclusive means by which a court may review an agency decision that is encompassed in a  
13 final agency order. Thus, out of the three claims against the State that are included in the  
14 petition, only one – the ORS 183.484 petition for judicial review – is proper, and the DJA and  
15 Measure 37 claims should be stricken. After that is accomplished, only two claims will remain  
16 in the petition: the ORS 183.484 claim against the State and the writ-of-review claim against the  
17 County. The State believes that those two claims properly may be litigated in the same action,  
18 with the understanding that bifurcation may become necessary at some point, if the issues related  
19 to the two claims diverge.

## 20 BACKGROUND

### 21 A. Measure 37

22 Oregon voters enacted Ballot Measure 37 through the initiative process in 2004.  
23 Codified as part of Chapter 197, where Oregon’s statewide land use planning statutes are found,  
24 Measure 37 permits owners of private real property to seek compensation for reductions in fair  
25 market value caused by certain land use regulations.

26

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

9 For regulations enacted prior to the effective date of Measure 37 (December 2, 2004),  
10 Section 5 requires owners to submit written demands by December 2, 2006, or the date on which  
11 a land use regulation is applied “as an approval criteria [sic]” on a specific land use application,  
12 whichever is later. After determining that an owner submitted a timely, valid written demand,  
13 the public entity has the option to pay compensation or to “modify, remove, or not to [sic] apply”  
14 land use regulations to the extent necessary “to allow the owner to use the property for a use  
15 permitted at the time the owner acquired the property.” ORS 197.352(8); *see also* ORS  
16 197.352(10).<sup>1</sup>

17 **B. The claims process**

18 Measure 37 permits public entities to adopt procedures for processing claims. ORS  
19 197.352 (7). The Department of Administrative Services (“DAS”) has adopted procedural rules,  
20 found at OAR 125-145-0010 to 125-145-0105. These rules cover issues like minimum  
21 requirements for a claim against the State, notice and third party participation, and the contents  
22 of the administrative record.

23 When DAS receives a claim, it provides written notice of the claim to neighboring  
24 landowners, certain neighborhood or community organizations, and anyone who requests notice.

25 \_\_\_\_\_  
26 <sup>1</sup> Allowing the owner to use the property in a way that would otherwise be prohibited by land  
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 OAR 125-145-0080. This provision is consistent with the notice provisions of ORS 215.416  
2 regarding notice of permits. Persons receiving notice, or any other person, may submit  
3 comments, evidence and information within ten days. OAR 125-145-0080(2), (3).

4 DAS initially reviews Measure 37 claims and forwards them to the appropriate state  
5 agency, *i e.* the “regulating entity” that appears to have enacted or enforced a relevant land use  
6 regulation. OAR 125-145-0090. The regulating entity, in this case DLCD, investigates and  
7 analyzes the claim and issues a draft report. OAR 125-145-100(1). The draft report provides the  
8 State’s preliminary determination on the necessary elements of the claim, including timeliness of  
9 the demand, ownership, the land use regulations that are the basis of the claim, the effect of  
10 relevant land use regulations on the property’s fair market value, and applicable exemptions, if  
11 any. OAR 125-145-100(2).

12 The draft report is made public on the internet and copies are mailed to the claimant, and  
13 any persons who submitted comments or requested notice. OAR 125-145-100(1). After a ten-  
14 day comment period, and based in part on the comments received, DLCD and DAS issue a final  
15 report and order. OAR 125-145-100. The final orders are served on any persons who received  
16 copies of the draft report or submitted comments on the draft report. DLCD also makes its final  
17 orders public by posting them on its website:  
18 ([http://www.oregon.gov/LCD/MEASURE37/final\\_staff\\_reports\\_2006.shtml](http://www.oregon.gov/LCD/MEASURE37/final_staff_reports_2006.shtml)).

19 **C. Petitioners’ Measure 37 claims and the State’s final orders**

20 Petitioners own real property in Josephine County. (Petition ¶ 1, Exs 3, 4 and 5). They  
21 submitted Measure 37 claims to the State, seeking compensation for the reduction in fair market  
22 value allegedly caused by land use regulations that restrict their use of the property. (Petition ¶  
23 6). DLCD issued final orders and reports on petitioners’ claims in September 2006. (Petition ¶  
24 7, Exs 3, 4 and 5). DLCD approved petitioners’ claims and granted relief from certain land use  
25 regulations dating back to the dates in 2003 on which DLCD determined that petitioners acquired  
26

1 their interests in the property. (Petition Exs 3, 4 and 5). DLCD based that determination on the  
2 dates in 2003 on which the various tax lots were deeded to petitioners. (See Exs A, B and C).<sup>2</sup>

### 3 ARGUMENT

#### 4 A. Introduction

5 Petitioners have petitioned for judicial review of the State’s final orders, seeking reversal  
6 or remand of the orders under ORS 183.484(5). (Petition ¶¶ 15-20 (second claim for relief)).

7 They contend that the final orders are flawed because the State “failed to acknowledge  
8 petitioners’ interests in the properties which accrued when petitioners’ parents acquired the  
9 properties and/or when petitioners obtained equitable interests in the properties and exercised  
10 possession and control over them.” (Petition ¶ 16). That petition for judicial review is the  
11 appropriate method for challenging the State’s final orders and the State anticipates that the  
12 parties will litigate the issues raised in the ORS 183.484 petition in the normal course.

13 However, petitioners also seek compensation under section 6 of Measure 37 (third claim)  
14 and declaratory relief (fourth claim). These two claims necessarily are based on petitioners’  
15 theory that they acquired interests in the property, for purposes of Measure 37, in the 1970s. In  
16 other words, the claims are based on an allegation that the State’s final orders include incorrect  
17 determinations of petitioners’ acquisition dates and that the final orders incorrectly do not  
18 “waive” land use regulations back to the 1970s.

19 Thus, petitioners’ Measure 37 and DJA claims challenge the correctness of findings made  
20 in the State’s final orders. As explained below, however, the APA sets forth the exclusive  
21 method for such a challenge. ORS 183.480(2) (“Judicial review of final orders of agencies shall  
22 be *solely* as provided by ORS 183.482, 183.484, 183.490 and 183.500”; emphasis added).

23 Consequently, the Measure 37 and DJA claims against the State should be stricken. This Court  
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25 <sup>2</sup> Petitioners attached the three final orders at issue to their petition. (Petition Exs 3, 4 and 5).  
26 However, they did not include the final DLCD staff reports and recommendations that are  
incorporated into those orders. The State has attached the complete final orders, including the  
staff reports and recommendations, as Exhibits A, B and C to this memorandum.

1 already has stricken the Measure 37 and DJA claims against the County for similar reasons,  
2 based on the exclusivity of the writ-of-review procedure for challenging county orders.

3 **B. The APA provides the exclusive means for challenging final orders issued by state**  
4 **agencies.**

5 The Oregon Court of Appeals consistently has held that the APA establishes the  
6 exclusive method to challenge decisions made by state agencies. *See e.g., Eppler v. Board of*  
7 *Tax Service Examiners*, 189 Or App 216, 220 (2003); *Lake County v. State of Oregon*, 142 Or  
8 App 162, 165 (1996) (“ORS 183.480 (2) and numerous decisions of this court make clear that  
9 judicial review of final agency orders shall be solely as provided in the APA”); *Mendieta v.*  
10 *Division of State Lands*, 148 Or App 586, 599-600 (1997), *rev dismissed*, 328 Or 331 (1999)  
11 (where “redress would have been available under ORS 183.484, had plaintiffs timely filed their  
12 petition for judicial review[,]” the Court of Appeals held, “the trial court erred in granting  
13 plaintiffs relief under ORS 183.490 and ORS 28.010”); *FOPPO v. County of Marion*, 193 Or  
14 App 93, 97 (1988), *rev denied*, 307 Or 326 (1989) (“PERS is subject to the APA; therefore, the  
15 APA provides the exclusive methods for its actions and for review of those actions”); *Bay River,*  
16 *Inc. v. Environmental Quality Comm’n*, 26 Or App 717, 720, *rev denied*, 276 Or 555 (1976).

17 The exclusive nature of the APA remedy applies even where plaintiffs attempt to use  
18 other statutory causes of action to get relief from an agency decision. For example, in *Bay River*,  
19 the Court of Appeals rejected an argument that the Declaratory Judgment Act, ORS 28.010 *et*  
20 *seq.*, provides a remedy with respect to agency orders in addition to the remedies provided under  
21 the APA. The circuit court in that case had granted the plaintiff an injunction and declaratory  
22 relief with respect to its application for a subsurface sewage disposal system feasibility permit –  
23 a matter within the Department of Environmental Quality’s purview. The Court of Appeals  
24 reversed and remanded, ordering the circuit court to vacate the judgment and dismiss the  
25 complaint. The appellate court explained that Bay River could not circumvent APA review  
26 merely by raising its complaint about agency actions in the context of another statute:

1 The Oregon Administrative Procedures Act, ORS 183.310 et seq,  
2 establishes a comprehensive pattern for the judicial review of  
3 administrative decisions. The various APA statutes governing  
4 judicial review provide the *sole and exclusive methods of obtaining*  
5 *judicial review*

6 This is sufficient answer to Bay River's contention that since it  
7 couched its complaint in equitable terms and sought a declaratory  
8 judgment, the circuit court obtained jurisdiction pursuant to ORS  
9 28.010. A party cannot ignore the judicial review provisions of the  
10 APA in favor of a general equitable or declaratory remedy.

11 *Bay River*, 26 Or App at 720 (emphasis added; citation omitted). *See also Eppler*, 189 Or App at  
12 222 ("plaintiffs' sole recourse [in arguing that state licensing requirements were preempted by  
13 federal law] was to raise their preemption claim in the contested case proceeding before the  
14 board and seek judicial review, under the APA, of any adverse ruling by the board"); *Lake*  
15 *County*, 142 Or App at 165-66 (1996) (declaratory relief not available where plaintiffs could  
16 have sought judicial review of an agency order under the APA).

17 The Court of Appeals also has rejected the argument that the Oregon Tort Claims Act  
18 ("OTCA"), ORS 30.265 et seq, provides a remedy with respect to agency orders that is  
19 cumulative to the APA remedy. In *Clarke Electric, Inc. v. State Highway Division*, 93 Or App  
20 693 (1988), the plaintiff contractor sued under the OTCA for harm allegedly arising from the  
21 Highway Division's rejection of the plaintiff's bid on a contract. The Court of Appeals held that  
22 the Division's rejection of the plaintiff's bid was a final order in other than a contested case and,  
23 therefore, that the plaintiff should have sought judicial review under the APA. *Id.*, 93 Or App at  
24 696-97. The court specifically rejected the plaintiff's argument that, because it sought damages,  
25 it was entitled to proceed directly under the OTCA:

26 Finally, plaintiff argues that it is seeking damages in tort under the  
Oregon Tort Claims Act, ORS 30.265, not review of the Division's  
order and, therefore, that the time limitations of the APA are not  
applicable. However, defendant's alleged liability in tort is  
premised on a finding that defendant's order rejecting the bid was  
improper. That order was a final order in other than a contested  
case, and the exclusive procedure for review of such an order is  
under the APA. Consequently, the trial court did not err in granting  
Division's motion to dismiss for failure to comply with the APA  
time limitations for judicial review.

1 *Id.* at 697 (citations omitted).<sup>3</sup>

2 Thus, the plaintiff in *Clarke Electric* could not circumvent APA review of an agency  
3 order by seeking monetary damages under the OTCA, just as the plaintiffs in the DJA cases cited  
4 above could not avoid APA review merely by seeking declaratory relief with respect to agency  
5 actions. The same principle applies to section 6 of Measure 37 – although it, too, creates a  
6 statutory cause of action, people who contest the legality of an agency order on a Measure 37  
7 claim must seek judicial review under the APA. Accordingly, this court lacks jurisdiction over  
8 petitioners’ DJA and Measure 37 claims against the State and should strike them, while allowing  
9 petitioners to proceed on their properly filed APA claim.

10 **C. Petitioners have not stated a Measure 37 compensation claim.**

11 For the same reason that this court lacks jurisdiction over the Measure 37 claim against  
12 the State, petitioners have failed to state a Measure 37 claim upon which relief can be granted.  
13 Petitioners could have a Measure 37 compensation claim only if the State *wrongfully* continued  
14 to apply land use regulations to the subject property more than 180 days after the demand for  
15 compensation was made. In other words, petitioners must establish that the State erred by  
16 “waiving” regulations only back to 2003, not back to the earlier dates on which petitioners allege  
17 they acquired their interests in the property. And that decision can be made only by judicial  
18 review of the final order under the APA. Because petitioners cannot properly assert outside the  
19 context of an APA claim that the State’s final order includes an incorrect waiver date, they have  
20 not stated a Measure 37 claim upon which relief can be granted. For that reason, too, petitioners’  
21 third claim for relief should be stricken.

22 **CONCLUSION**

23 The gravamen of petitioners’ DJA and Measure 37 compensation claims is that DLCD’s  
24 determination of their acquisition dates was wrong. Because the APA provides the exclusive  
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26 <sup>3</sup> See also *Muller v. Dept. of Agriculture*, 164 Or App 11, 15-16 (1999) (plaintiff could not avoid APA review by suing for damages in tort when “his entitlement to damages depend[ed] on the validity of” an agency’s denial of a permit application).

1 procedure for petitioners to dispute DLCD's waiver-date determination, this court lacks  
2 jurisdiction over petitioners' DJA and Measure 37 claims, and should strike them.

3 DATED this 25<sup>th</sup> day of January, 2007.

4 Respectfully submitted,

5 HARDY MYERS  
6 Attorney General

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14 Of Attorneys for State of Oregon

BEFORE THE DEPARTMENT OF ADMINISTRATIVE SERVICES AND  
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. M124320  
(BALLOT MEASURE 37) OF )  
Roy A. Pondelick and )  
Tana Pondelick, CLAIMANTS )

Claimants: Roy A. Pondelick and Tana Pondelick (the Claimants)

Property: Township 37, Range 05, Section 25, Tax lot 300, Josephine County (the Property)

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

Claimants submitted the Claim to the State of Oregon under ORS 197.352. Under OAR 125-145-0010 *et seq.*, the Department of Administrative Services (DAS) referred the Claim to the Department of Land Conservation and Development (DLCD) as the regulating entity. This order is based on the record herein, including the Findings and Conclusions set forth in the Final Staff Report and Recommendation of DLCD (the DLCD Report) attached to and by this reference incorporated into this order.

ORDER

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

1. In lieu of compensation under ORS 197.352, the State of Oregon will not apply the following laws to Roy and Tana Pondelick's division of the 29.37-acre subject property into five approximately 5-acre parcels or to their development of a dwelling on each parcel: applicable provisions of Goal 3, ORS 215 and OAR 660, division 33, enacted or adopted after the claimants acquired the subject property. These laws will not apply to the claimants only to the extent necessary to allow them to use the subject property for the use described in this report, and only to the extent that use was permitted when Roy Pondelick acquired the property on May 27, 2003, and Tana Pondelick acquired it on October 30, 2003. The department acknowledges that the relief to which the claimants are entitled under ORS 197.352 will not allow the claimants to use the subject property in the manner set forth in the claim.
2. The action by the State of Oregon provides the state's authorization to the claimants to use the subject property for the use described in this report, subject to the standards in effect on May 27, 2003, when Roy Pondelick acquired the property and October 30, 2003, when Tana

Pondelick acquired the property. On those dates, the property was subject to the applicable provisions of Goal 3, ORS 215 and OAR 660, division 33, currently in effect.

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

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

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

This Order is entered by the Deputy 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 Director 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



Cora R. Parker, Deputy Director  
DLCD

Dated this 5<sup>th</sup> day of September, 2006.

FOR the DEPARTMENT OF  
ADMINISTRATIVE SERVICES:

  
Lindsay A. Ball, Director  
DAS

Dated this 5<sup>th</sup> day of September, 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 197.352, the present owner of the property, or any interest therein, shall have a cause of action in the circuit court in which the real property is located.

(Copies of the documents that comprise the record are available for review at the Department's office at 635 Capitol Street NE, Suite 150, Salem, Oregon 97301-2540)

### **FOR INFORMATION ONLY**

The Oregon Department of Justice has advised the Department of Land Conservation and Development that "[i]f the current owner of the real property conveys the property before the new use allowed by the public entity is established, then the entitlement to relief will be lost."

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

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

September 5, 2006

**STATE CLAIM NUMBER:** M124320

**NAMES OF CLAIMANTS:** Roy A. Pondelick  
Tana Pondelick

**MAILING ADDRESS:** PO Box 343  
Murphy, Oregon 97533

**PROPERTY IDENTIFICATION:** Township 37, Range 05, Section 25  
Tax lot 300  
Josephine County

**OTHER CONTACT INFORMATION:** Walter L. Cauble  
Cauble, Dole & Sorenson  
PO Box 398  
Grants Pass, Oregon 97528

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

**180-DAY DEADLINE:** September 9, 2006

**I. SUMMARY OF CLAIM**

The claimants, Roy and Tana Pondelick, seek compensation in the amount of \$480,000 for the reduction in fair market value as a result of land use regulations that are alleged to restrict the use of certain private real property. The claimants desire compensation or the right to divide the 29.37-acre subject property into five approximately 5-acre parcels,<sup>1</sup> and to develop a dwelling on each parcel. The subject property is located at 1905 Missouri Flat Road, near Grants Pass, in Josephine County. (See claim.)

<sup>1</sup> The claim form indicates a desire to divide the subject property into the maximum number of lots possible. However, in section 8 of the claim form, claimants indicate that the property was zoned SR-5 "at the time of acquisition" (probably indicating 1990), and that the SR-5 zoning at that time would have allowed five 5-acre lots. In response to a staff inquiry to clarify the claimants' desired use, the claimants' attorney stated that the claimants desired to reserve the right to further divide at a later date. However, ORS 197.352 authorizes the department to waive land use regulations enacted after the claimants acquired the property and that have the effect of reducing the property's fair market value, in order to allow the claimants "a use" allowed when the claimants acquired the property. The determination of which regulations restrict that desired use and have the effect of reducing the fair market necessitates that the desired use must be identified. ORS 197.352 does not authorize the department to eliminate land use regulations or waive all land use regulations to allow the claimants to decide in the future "a use" that the claimants could have established when the claimants acquired the property. This report is based on the desired use department staff was able to ascertain from the facts provided.

## 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 Roy and Tana Pondelick's division of the 29.37-acre subject property into five approximately five-acre lots and to their development of a dwelling on each parcel: applicable provisions of Statewide Planning Goal 3 (Agricultural Lands), ORS 215 and Oregon Administrative Rules (OAR) 660, division 33, enacted or adopted after the claimants acquired the subject property. These laws will not apply to the claimants only to the extent necessary to allow them to use the subject property for the use described in this report, and only to the extent that use was permitted when Roy Pondelick acquired the property on May 27, 2003, and Tana Pondelick acquired it on October 30, 2003. The department acknowledges that the relief to which the claimants are entitled under ORS 197.352 will not allow them to use the subject property in the manner set forth in the claim. (See the complete recommendation in Section VI. of this report.)

## III. COMMENTS ON THE CLAIM

### Comments Received

On May 26, 2006, 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 were received in response to the 10-day notice.

## IV. TIMELINESS OF CLAIM

### Requirement

ORS 197.352(5) requires that a written demand for compensation be made:

1. For claims arising from land use regulations enacted prior to the effective date of Measure 37 (December 2, 2004), within two years of that effective date, or the date the public entity applies the land use regulation as an approval criteria to an application submitted by the owner, whichever is later; or
2. For claims arising from land use regulations enacted after the effective date of Measure 37 (December 2, 2004), within two years of the enactment of the land use regulation, or the date the 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 March 13, 2006, for processing under OAR 125, division 145. The claim identifies provisions of Goal 4 (Forest Lands) and county regulations as the basis for the claim. Only laws that were enacted or adopted prior to December 2, 2004, are the basis for this claim.

## **Conclusions**

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

## **V. ANALYSIS OF CLAIM**

### **1. Ownership**

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

### **Findings of Fact**

Claimant Roy Pondelick acquired the subject property on May 27, 2003, as reflected by a bargain and sale deed included with the claim. On October 30, 2003, Roy Pondelick transferred the subject property to himself and claimant Tana Pondelick as trustees of the Roy A. Pondelick and Tana Pondelick Revocable Trust.<sup>2</sup> The claimants’ parents, Albert and Adeline Pondelick, acquired the subject property on June 23, 1971, as evidenced by a certification of trust included with the claim. The Josephine County Assessor’s Office confirms the claimants’ current ownership of the subject property.

### **Conclusions**

The claimants, Roy and Tana Pondelick, are “owners” of the subject property as that term is defined by ORS 197.352(11)(C). Roy Pondelick has been an owner since May 27, 2003, and Tana Pondelick has been an owner since October 30, 2003. The claimants’ parents, Albert and Adeline Pondelick, are “family members,” as defined by ORS 197.352(11)(A), and acquired the subject property on June 23, 1971.

### **2. The Laws That are the Basis for This Claim**

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

### **Findings of Fact**

The claim indicates that the claimants desire to divide the 29.37-acre subject property into five approximately 5-acre parcels and to develop a dwelling on each parcel. It indicates that county regulations and Goal 4 prohibit the desired use.<sup>3</sup>

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<sup>2</sup> Transfer of property to a revocable trust does not result in a change of ownership for the purposes of ORS 197.352

<sup>3</sup> The claimants cite Goal 4 (Forest Use) as restricting the desired use. Goal 4 does not apply to this EFU-zoned property. This report addresses those regulations that the department finds are applicable to and restrict the claimants’ use of the subject property, based on the claimants’ asserted desired use.

The claim is based generally on the applicable provisions of state law that require Exclusive Farm Use (EFU) zoning and restrict uses on EFU-zoned land. The claimants' property is zoned farm resource by Josephine County. The farm resource zone is an EFU zone as required by Goal 3, in accordance with ORS 215 and OAR 660, division 33, because the claimants' property is "agricultural land" as defined by Goal 3.<sup>4</sup> Goal 3 became effective on January 25, 1975, and required that agricultural lands as defined by the Goal are zoned EFU pursuant to ORS 215.

Current land use regulations, particularly ORS 215.263, 215.284 and 215.780 and OAR 660, division 33, enacted or adopted pursuant to Goal 3, prohibit the division of EFU-zoned land into parcels less than 80 acres and establish standards for the development of dwellings on existing or any proposed parcel on that land.

ORS 215.780 establishes an 80-acre minimum size for the creation of new lots or parcels in EFU zones and became effective on November 4, 1993 (Chapter 792, Oregon Laws 1993). ORS 215.263 (2005 edition) establishes standards for the creation of new parcels for non-farm uses and dwellings allowed in an EFU zone.

OAR 660-033-0135 (applicable to farm dwellings) became effective on March 1, 1994, and interprets the statutory standard for a primary dwelling in an EFU zone under ORS 215.283(1)(f). OAR 660-033-0130(4) (applicable to non-farm dwellings) became effective on August 7, 1993, and was amended to comply with ORS 215.284(4) on March 1, 1994. The Commission subsequently adopted amendments to comply with House Bill 3326 (Chapter 704, Oregon Laws 2001, effective on January 1, 2002), which were effective on May 22, 2002. (See administrative rule history for OAR 660-033-0100, -0130 and -0135.)

The claimants' family first acquired the subject property in 1971, prior to the adoption of the statewide planning goals and their implementing statutes and regulations. No county zoning applied to the subject property in 1971.

### **Conclusions**

The current zoning requirements, minimum lot size and dwelling standards established by applicable provisions of Goal 3, ORS 215 and OAR 660, division 33, were all enacted or adopted after the claimants' family acquired the subject property. These laws restrict the use of the subject property relative to the uses allowed when the claimants' family acquired the property.

### **3. Effect of Regulations on Fair Market Value**

In order to establish a valid claim, ORS 197.352(1) requires that the land use 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."

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<sup>4</sup> The claimants' property is "agricultural land" because it contains National Resources Conservation Service Class I-IV soils.

### **Findings of Fact**

The claim includes an estimate of \$480,000 as the reduction in the subject property's fair market value due to the regulations that restrict the claimants' desired use of the property. This amount is based on the claimants' assessment of sales of similar properties in the area.

### **Conclusions**

As explained in Section V.(1) of this report, the claimants are Roy and Tana Pondelick whose family members acquired the subject property in 1971. Under ORS 197.352, the claimants are due compensation for land use regulations that restrict the use of the property and have the effect of reducing its fair market value. Based on the findings and conclusions in Section V.(2) of this report, laws enacted or adopted since the claimants' family acquired the subject property restrict the claimants' desired use of the property. The claimants estimate that the effect of the regulations on the fair market value of the subject property is a reduction of \$480,000.

Without an appraisal or other documentation, it is not possible to substantiate the specific dollar amount by which the land use regulations have reduced the fair market value of the subject property. Nevertheless, based on the evidence in the record for this claim, the department determines that the fair market value of the subject property has been reduced to some extent as a result of land use regulations enforced by the Commission or the department since the claimants' family acquired the property.

#### **4. Exemptions Under ORS 197.352(3)**

ORS 197.352 does not apply to certain land use regulations. In addition, under ORS 197.352(3), certain types of laws are exempt from ORS 197.352.

### **Findings of Fact**

The claim is based on state land use regulations that restrict the use of the subject property relative to the uses permitted when the claimants' family acquired the property, including applicable provisions of Goal 3, ORS 215 and OAR 660, division 33, which Josephine County has implemented through its current farm resource zone. All of these land use regulations were enacted or adopted after the claimants' family acquired the subject property.

### **Conclusions**

It appears that none of the general statutory, goal and rule restrictions on residential division and development of the subject property were in effect when the claimants' family acquired the property on June 23, 1970. As a result, these laws are not exempt under ORS 197.352(3)(E). Laws in effect when the claimants' family acquired the subject property are exempt under ORS 197.352(3)(E) and do not provide a basis for compensation. In addition, other land use laws enacted or adopted for a purpose set forth in ORS 197.352(3)(A) to (D) are also exempt and would not provide a basis for compensation.

## VI. FORM OF RELIEF

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

### Findings of Fact

Based on the findings and conclusions set forth in this report, laws enforced by the Commission or the department restricts the claimants' desired use of the subject property. The claim asserts that existing state land use regulations enforced by the Commission or the department have the effect of reducing the fair market value of the subject property by \$480,000. However, because the claim does not provide an appraisal or other relevant evidence demonstrating that the land use regulations described in Section V.(2) reduce the fair market value of the subject property, a specific amount of compensation cannot be determined. In order to determine a specific amount of compensation due for this claim, it would also be necessary to verify whether or the extent to which the claimants' desired use of the subject property was allowed under the standards in effect when the claimants' family acquired the property. Nevertheless, based on the record for this claim, the department has determined that the laws on which the claim is based have reduced the fair market value of the subject property to some extent.

No funds have been appropriated at this time for the payment of claims. In lieu of payment of compensation, ORS 197.352 authorizes the department to modify, remove or not apply all or parts of certain land use regulations to allow the claimants to use the subject property for a use permitted at the time Roy Pondelick acquired the property on May 27, 2003, and Tana Pondelick acquired the property on October 30, 2003.

At the time the claimants acquired the subject property, it was zoned EFU by Josephine County and subject to the current lot size and dwelling standards under Goal 3, ORS 215 and OAR 660, division 33, and as described in Section V.(2) of this report.

In addition to the applicable provisions of Goal 3 and ORS 215 in effect on May 27 and October 30, 2003, and other laws in effect when the claimants acquired the subject property, there may be other laws that apply to the claimants' use of the property that have not been identified in the claim. This report addresses only those state laws that are identified in the claim, or that the department is certain apply to the subject property based on the uses that the claimants have identified. Similarly, this report only addresses the exemptions provided for under ORS 197.352(3) that are clearly applicable given the information provided to the department in the claim. The claimants should be aware that the less information they have provided to the department in their claim, the greater the possibility that there may be additional laws that will later be determined to continue to apply to their use of the subject property.

## Conclusions

Based on the record, the department recommends that the claim be approved, subject to the following terms:

1. In lieu of compensation under ORS 197.352, the State of Oregon will not apply the following laws to Roy and Tana Pondelick's division of the 29.37-acre subject property into five approximately 5-acre parcels or to their development of a dwelling on each parcel: applicable provisions of Goal 3, ORS 215 and OAR 660, division 33, enacted or adopted after the claimants acquired the subject property. These laws will not apply to the claimants only to the extent necessary to allow them to use the subject property for the use described in this report, and only to the extent that use was permitted when Roy Pondelick acquired the property on May 27, 2003, and Tana Pondelick acquired it on October 30, 2003. The department acknowledges that the relief to which the claimants are entitled under ORS 197.352 will not allow the claimants to use the subject property in the manner set forth in the claim.
2. The action by the State of Oregon provides the state's authorization to the claimants to use the subject property for the use described in this report, subject to the standards in effect on May 27, 2003, when Roy Pondelick acquired the property and October 30, 2003, when Tana Pondelick acquired the property. On those dates, the property was subject to the applicable provisions of Goal 3, ORS 215 and OAR 660, division 33, currently in effect.
3. To the extent that any law, order, deed, agreement or other legally enforceable public or private requirement provides that the subject property may not be used without a permit, license or other form of authorization or consent, the order will not authorize the use of the property unless the claimants first obtain that permit, license or other form of authorization or consent. Such requirements may include, but are not limited to: a building permit, a land use decision, a "permit" as defined in ORS 215.402 or 227.160, other permits or authorizations from local, state or federal agencies and restrictions on the use of the subject property imposed by private parties.
4. Any use of the subject property by the claimants under the terms of the order will remain subject to the following laws: (a) those laws not specified in (1) above; (b) any laws enacted or enforced by a public entity other than the Commission or the department; and (c) those laws not subject to ORS 197.352 including, without limitation, those laws exempted under ORS 197.352(3).
5. Without limiting the generality of the foregoing terms and conditions, in order for the claimants to use the subject property, it may be necessary for them to obtain a decision under ORS 197.352 from a city and/or county and/or metropolitan service district that enforces land use regulations applicable to the property. Nothing in this order relieves the claimants from the necessity of obtaining a decision under ORS 197.352 from a local public entity that has jurisdiction to enforce a land use regulation applicable to a use of the subject property by the claimants.

## VII. COMMENTS ON THE DRAFT STAFF REPORT

The department issued its draft staff report on this claim on August 17, 2006. OAR 125-145-0100(3), provided an opportunity for the claimants or the claimants' authorized agent and any third parties who submitted comments under OAR 125-145-0080 to submit written comments, evidence and information in response to the draft staff report and recommendation. Comments received have been taken into account by the department in the issuance of this final report.

BEFORE THE DEPARTMENT OF ADMINISTRATIVE SERVICES AND  
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. M124416 and  
(BALLOT MEASURE 37) OF ) M124417  
Roy A. Pondelick, Tana Pondelick and )  
Neal A. Pondelick, CLAIMANTS )

Claimants: Roy A. Pondelick, Tana Pondelick and Neal A. Pondelick (the Claimants)

Property: Township 37S, Range 5W, Section 25, Tax lots 301 and 800, Josephine County  
(the Property)

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

Claimants submitted the Claim to the State of Oregon under ORS 197.352. Under OAR 125-145-0010 *et seq.*, the Department of Administrative Services (DAS) referred the Claim to the Department of Land Conservation and Development (DLCD) as the regulating entity. This order is based on the record herein, including the Findings and Conclusions set forth in the Final Staff Report and Recommendation of DLCD (the DLCD Report) attached to and by this reference incorporated into this order.

ORDER

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

1. In lieu of compensation under ORS 197.352, the State of Oregon will not apply the following laws to Roy, Tana and Neal Pondelick's division of the subject property into five-acre parcels and to develop a dwelling on each parcel: applicable provisions of Goals 3 and 4, ORS 215 and OAR 660, divisions 6, and 33, enacted or adopted after each claimant acquired the subject property. These laws will not apply to the claimants only to the extent necessary to allow them to use the subject property for the use described in this report, and only to the extent that use was permitted when Roy Pondelick acquired the property on June 23, 2003, and Tana and Neal Pondelick acquired it on October 30, 2003. The department acknowledges that the relief to which the claimants are entitled under ORS 197.352 will not allow the claimants to use the subject property in the manner set forth in the claim.

2. The action by the State of Oregon provides the state's authorization to the claimants to use the subject property for the use described in this report, subject to the standards in effect on June 23, 2003, for Roy Pondelick and October 30, 2003, for Tana and Neal Pondelick. In 2003, the

property was subject to applicable provisions of Goals 3 and 4, ORS 215 and OAR 660, divisions 6, and 33, currently in effect.

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

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

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

This Order is entered by the Deputy 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 Director 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:

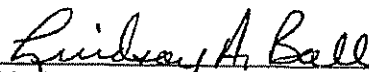
Lane Shetterly, Director



Cora R. Parker, Deputy Director  
DLCD

Dated this 5<sup>th</sup> day of September, 2006.

FOR the DEPARTMENT OF  
ADMINISTRATIVE SERVICES:



Lindsay A. Ball, Director  
DAS

Dated this 5<sup>th</sup> day of September, 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 197.352, the present owner of the property, or any interest therein, shall have a cause of action in the circuit court in which the real property is located.

(Copies of the documents that comprise the record are available for review at the Department's office at 635 Capitol Street NE, Suite 150, Salem, Oregon 97301-2540)

### **FOR INFORMATION ONLY**

The Oregon Department of Justice has advised the Department of Land Conservation and Development that "[i]f the current owner of the real property conveys the property before the new use allowed by the public entity is established, then the entitlement to relief will be lost."

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

September 5, 2006

**STATE CLAIM NUMBER:** M124416 and M124417

**NAMES OF CLAIMANTS:** Roy A. Pondelick  
Tana Pondelick  
Neal A. Pondelick

**MAILING ADDRESS:** PO Box 343  
Murphy, Oregon 97533

**PROPERTY IDENTIFICATION:** Township 37S, Range 5W, Section 25  
Tax lots 301 and 800  
Josephine County

**OTHER CONTACT INFORMATION:** Walter L. Cauble  
Cauble, Dole & Sorenson  
PO Box 398  
Grants Pass, Oregon 97528

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

**180-DAY DEADLINE:** September 9, 2006

**I. SUMMARY OF CLAIM**

The claimants, Roy, Tana and Neal Pondelick, seek compensation in the amount of \$2,730,000 for the reduction in fair market value as a result of land use regulations that are alleged to restrict the use of certain private real property.<sup>1</sup> The claimants desire compensation or the right to divide the subject property (tax lots 301 and 800) into five-acre parcels and to develop a dwelling on each parcel. The subject property is located at 1021 and 858 Missouri Flat Road, near Grants Pass, in Josephine 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

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<sup>1</sup> The claimants submitted a separate claim for relief under ORS 197.352 for each of the two subject tax lots. The two claims were consolidated under this report. The claimants seek compensation for \$480,000 for tax lot 301, which consists of 20 acres, and \$2,250,000 for tax lot 800, which consists of 90 acres.

by the Land Conservation and Development Commission (the Commission) or the department not apply to Roy, Tana and Neal Pondelick's division of the subject property into five-acre parcels and to develop a dwelling on each 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 each claimant acquired the subject property. These laws will not apply to the claimants only to the extent necessary to allow them to use the subject property for the use described in this report, and only to the extent that use was permitted when Roy Pondelick acquired the property on June 23, 2003, and Tana and Neal Pondelick acquired it on October 30, 2003. The department acknowledges that the relief to which the claimants are entitled under ORS 197.352 will not allow the claimants to use the subject property in the manner set forth in the claim. (See the complete recommendation in Section VI. of this report.)

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

#### **Comments Received**

On June 19, 2006, pursuant to OAR 125-145-0080, the Oregon Department of Administrative Services (DAS) provided written notice to the owners of surrounding properties. According to DAS, three written comments were received in response to the 10-day notice.

The comments do not address whether the claim meets the criteria for relief under ORS 197.352. Comments concerning the effects a use of the property may have on surrounding areas are generally not something that the department is able to consider in determining whether to waive a state law. If funds do become available to pay compensation, then such effects may become relevant in determining which claims to pay compensation for instead of waive a state law. (See the comment letters in the department's claim file.)

### **IV. TIMELINESS OF CLAIM**

#### **Requirement**

ORS 197.352(5) requires that a written demand for compensation be made:

1. For claims arising from land use regulations enacted prior to the effective date of Measure 37 (December 2, 2004), within two years of that effective date, or the date the public entity applies the land use regulation as an approval criteria to an application submitted by the owner, whichever is later; or
2. For claims arising from land use regulations enacted after the effective date of Measure 37 (December 2, 2004), within two years of the enactment of the land use regulation, or the date the owner of the property submits a land use application in which the land use regulation is an approval criteria, whichever is later.

#### **Findings of Fact**

This claim was submitted to DAS on March 13, 2006, for processing under OAR 125, division 145. The claim identifies Goal 4 and county zoning regulations as the basis for the

claim. Only laws that were enacted or adopted prior to December 2, 2004, are the basis for this claim.

### **Conclusions**

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

## **V. ANALYSIS OF CLAIM**

### **1. Ownership**

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

### **Findings of Fact**

Claimant Roy Pondelick acquired the subject property on June 23, 2003, as reflected by a bargain and sale deed included with the claim. On October 30, 2003, Roy Pondelick transferred the subject property to himself and Tana Pondelick as trustees of the Roy A. Pondelick and Tana Pondelick Revocable Trust and to Neal Pondelick as trustee of the Neal Pondelick Revocable Trust<sup>2</sup> as reflected by bargain and sale deeds included with the claim. The claimants’ parents acquired the subject property on June 23, 1971, as reflected by a warranty deed included with the claim. The Josephine County Assessor’s Office confirms the claimants’ current ownership of the subject property.

### **Conclusions**

The claimants, Roy, Tana and Neal Pondelick, are “owners” of the subject property as that term is defined by ORS 197.352(11)(C). Roy Pondelick has been an owner since June 23, 2003, and Tana and Neal Pondelick have been owners since October 30, 2003. The claimants’ parents are “family members” as defined by ORS 197.352(11)(A) and acquired the subject property on June 23, 1971.

### **2. The Laws That are the Basis for This Claim**

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

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<sup>2</sup> Transfer of property to a revocable trust does not result in a change of ownership for the purposes of ORS 197.352.

## **Findings of Fact**

The claim indicates that the claimants desire to divide the tax lots that compose the subject property into five-acre parcels and to develop a dwelling on each parcel. It indicates that Goal 4 prohibits the desired use.

The claim is based generally on the applicable provisions of state law that require Exclusive Farm Use (EFU) and forest zoning.

Tax lot 301 is zoned farm resource by Josephine County, and the eastern 40 plus acres of tax lot 800 is zoned farm resource by Josephine County. The farm resource zone is an EFU zone as required by Goal 3, in accordance with ORS 215 and OAR 660, division 33, because tax lot 301 and the eastern portion of tax lot 800 are "agricultural lands" as defined by Goal 3.<sup>3</sup> Goal 3 became effective on January 25, 1975, and required that agricultural lands as defined by the Goal be zoned EFU pursuant to ORS 215.

Current land use regulations, particularly ORS 215.263, 215.284 and 215.780 and OAR 660, division 33, enacted or adopted pursuant to Goal 3, prohibit the division of the EFU-zoned portion of the land into parcels less than 80 acres and establish standards for the development of dwellings on existing or any proposed parcel on that land.

ORS 215.780 establishes an 80-acre minimum size for the creation of new lots or parcels in EFU zones and became effective on November 4, 1993 (Chapter 792, Oregon Laws 1993). ORS 215.263 (2005 edition) establishes standards for the creation of new parcels for non-farm uses and dwellings allowed in an EFU zone.

OAR 660-033-0135 (applicable to farm dwellings) became effective on March 1, 1994, and interprets the statutory standard for a primary dwelling in an EFU zone under ORS 215.283(1)(f). OAR 660-033-0130(4) (applicable to non-farm dwellings) became effective on August 7, 1993, and was amended to comply with ORS 215.284(4) on March 1, 1994. The Commission subsequently adopted amendments to comply with House Bill 3326 (Chapter 704, Oregon Laws 2001, effective on January 1, 2002), which were effective on May 22, 2002. (See administrative rule history for OAR 660-033-0100, -0130 and -0135.)

The western 50 plus acres of tax lot 800 is zoned forest commercial, a forest zone, as required by Goal 4, in accordance with ORS 215 and OAR 660, division 6, because this portion of the claimants' property is "forest land," as required by Goal 4. Goal 4 became effective on January 25, 1975, and requires that forest land be zoned for forest use (see statutory and rule history under OAR 660-015-0000(4)). The forest land administrative rules (OAR 660, division 6) became effective on September 1, 1982, and ORS 215.705 to 215.755 and 215.780 became effective on November 4, 1993 (Chapter 792, Oregon Laws 1993). OAR 660-006-0026 and 660-006-0027 were amended on March 1, 1994, to implement those statutes.

The claimants' family first acquired the subject property in 1971, prior to the adoption of the statewide planning goals and their implementing statutes and regulations.

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<sup>3</sup> The claimants' property is "agricultural land" because it contains National Resources Conservation Service Class I-IV soils

## **Conclusions**

The current zoning requirements, minimum lot size and dwelling standards established by applicable provisions of Goals 3 and 4, ORS 215 and OAR 660, divisions 6, and 33, were all enacted or adopted after the claimants' family acquired the subject property. These laws restrict the use of the subject property relative to the uses allowed when the claimants' family acquired the property.

### **3. Effect of Regulations on Fair Market Value**

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

### **Findings of Fact**

The claim includes an estimate of \$2,730,000 as the reduction in the subject property's fair market value due to the regulations that restrict the claimants' desired use of the property. This amount is based on the claimants' assessment of the subject property's value.

## **Conclusions**

As explained in Section V.(1) of this report, the claimants are Roy, Tana and Neal Pondelick whose family members acquired the subject property in 1971. Under ORS 197.352, the claimants are due compensation for land use regulations that restrict the use of the property and have the effect of reducing its fair market value. Based on the findings and conclusions in Section V.(2) of this report, laws enacted or adopted since the claimants' family acquired the subject property restrict the claimants' desired use of the property. The claimants estimate that the effect of the regulations on the fair market value of the subject property is a reduction of \$2,730,000.

Without an appraisal or other documentation, it is not possible to substantiate the specific dollar amount by which the land use regulations have reduced the fair market value of the subject property. Nevertheless, based on the evidence in the record for this claim, the department determines that the fair market value of the subject property has been reduced to some extent as a result of land use regulations enforced by the Commission or the department since the claimants' family acquired the property.

### **4. Exemptions Under ORS 197.352(3)**

ORS 197.352 does not apply to certain land use regulations. In addition, under ORS 197.352(3), certain types of laws are exempt from ORS 197.352.

### **Findings of Fact**

The claim is based on state land use regulations that restrict the use of the subject property relative to the uses permitted when the claimants' family acquired the property, including applicable provisions of Goals 3 and 4, ORS 215 and OAR 660, divisions 6, and 33, which

Josephine County has implemented through its current farm resource and forest commercial zones.

### **Conclusions**

It appears that none of the general statutory, goal and rule restrictions on residential division and development of the subject property were in effect when the claimants' family acquired the property on June 23, 1971. As a result, these laws are not exempt under ORS 197.352(3)(E). Laws in effect when the claimants' family acquired the subject property are exempt under ORS 197.352(3)(E) and do not provide a basis for compensation. In addition, other land use laws enacted or adopted for a purpose set forth in ORS 197.352(3)(A) to (D) are also exempt and would not provide a basis for compensation.

In addition, for the forest-zoned portion of the property, 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).

### **VI. FORM OF RELIEF**

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

### **Findings of Fact**

Based on the findings and conclusions set forth in this report, laws enforced by the Commission or the department restrict the claimants' desired use of the subject property. The claim asserts that existing state land use regulations enforced by the Commission or the department have the effect of reducing the fair market value of the subject property by \$2,730,000. However, because the claim does not provide an appraisal or other relevant evidence demonstrating that the land use regulations described in Section V.(2) reduce the fair market value of the subject property, a specific amount of compensation cannot be determined. In order to determine a specific amount of compensation due for this claim, it would also be necessary to verify whether or the extent to which the claimants' desired use of the subject property was allowed under the standards in effect when the claimants' family acquired the property. Nevertheless, based on the record for this claim, the department has determined that the laws on which the claim is based have reduced the fair market value of the subject property to some extent.

No funds have been appropriated at this time for the payment of claims. In lieu of payment of compensation, ORS 197.352 authorizes the department to modify, remove or not apply all or

parts of certain land use regulations to allow Roy, Tana and Neal Pondelick to use the subject property for a use permitted at the time Roy Pondelick acquired the property on June 23, 2003, and Tana and Neal Pondelick acquired it on October 30, 2003.

At the time the claimants acquired an interest in the subject property, it was zoned farm resource and forest commercial by Josephine County and subject to the current lot size and dwelling standards under Goals 3 and 4, ORS 215 and OAR 660, divisions 6, and 33, currently in effect, and as described in Section V.(2) of this report.

In addition to the applicable provisions of Goals 3 and 4, ORS 215 and OAR 660, divisions 6, and 33, there may be other laws that apply to the claimants' use of the property that have not been identified in the claim. This report addresses only those state laws that are identified in the claim, or that the department is certain apply to the subject property based on the uses that the claimants have identified. Similarly, this report only addresses the exemptions provided for under ORS 197.352(3) that are clearly applicable given the information provided to the department in the claim. The claimants should be aware that the less information they have provided to the department in their claim, the greater the possibility that there may be additional laws that will later be determined to continue to apply to their use of the subject property.

### **Conclusions**

Based on the record, the department recommends that the claim be approved, subject to the following terms:

1. In lieu of compensation under ORS 197.352, the State of Oregon will not apply the following laws to Roy, Tana and Neal Pondelick's division of the subject property into five-acre parcels and to develop a dwelling on each parcel: applicable provisions of Goals 3 and 4, ORS 215 and OAR 660, divisions 6, and 33, enacted or adopted after each claimant acquired the subject property. These laws will not apply to the claimants only to the extent necessary to allow them to use the subject property for the use described in this report, and only to the extent that use was permitted when Roy Pondelick acquired the property on June 23, 2003, and Tana and Neal Pondelick acquired it on October 30, 2003. The department acknowledges that the relief to which the claimants are entitled under ORS 197.352 will not allow the claimants to use the subject property in the manner set forth in the claim.
2. The action by the State of Oregon provides the state's authorization to the claimants to use the subject property for the use described in this report, subject to the standards in effect on June 23, 2003, for Roy Pondelick and October 30, 2003, for Tana and Neal Pondelick. In 2003, the property was subject to applicable provisions of Goals 3 and 4, ORS 215 and OAR 660, divisions 6, and 33, currently in effect.
3. To the extent that any law, order, deed, agreement or other legally enforceable public or private requirement provides that the subject property may not be used without a permit, license or other form of authorization or consent, the order will not authorize the use of the property unless the claimants first obtain that permit, license or other form of authorization or consent. Such requirements may include, but are not limited to: a building permit, a land use decision, a "permit" as defined in ORS 215.402 or 227.160, other permits or authorizations from local, state or federal agencies and restrictions on the use of the subject property imposed by private parties.

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

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

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

The department issued its draft staff report on this claim on August 17, 2006. OAR 125-145-0100(3), provided an opportunity for the claimants or the claimants' authorized agent and any third parties who submitted comments under OAR 125-145-0080 to submit written comments, evidence and information in response to the draft staff report and recommendation. Comments received have been taken into account by the department in the issuance of this final report.

BEFORE THE DEPARTMENT OF ADMINISTRATIVE SERVICES AND  
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. M124300  
(BALLOT MEASURE 37) OF )  
Roy, Tana and Neal Pondelick )  
Trustees of Pondelick Family Trust, CLAIMANTS )

Claimants: Roy, Tana and Neal Pondelick  
Trustees of Pondelick Family Trust (the Claimants)

Property: Township 37S, Range 6W, Section 13A, Tax lot 3100  
Josephine County (the Property)

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

Claimants submitted the Claim to the State of Oregon under ORS 197.352. Under OAR 125-145-0010 *et seq.*, the Department of Administrative Services (DAS) referred the Claim to the Department of Land Conservation and Development (DLCD) as the regulating entity. This order is based on the record herein, including the Findings and Conclusions set forth in the Final Staff Report and Recommendation of DLCD (the DLCD Report) attached to and by this reference incorporated into this order.

ORDER

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

1. In lieu of compensation under ORS 197.352, the State of Oregon will not apply the following laws to Roy, Tana and Neal Pondelick's division of the 38.79-acre subject property into two parcels or to their development of a dwelling on one parcel: applicable provisions of Goal 4, ORS 215 and OAR 660, division 6, enacted or adopted after each claimant acquired the subject property. These laws will not apply to the claimants only to the extent necessary to allow them to use the subject property for the use described in this report, and only to the extent that use was permitted when Roy Pondelick acquired the property on June 3, 2003, and when Tana and Neal Pondelick acquired the property on October 30, 2003. The department acknowledges that the relief to which the claimants are entitled under ORS 197.352 will not allow the claimants to use the subject property in the manner set forth in the claim.
2. The action by the State of Oregon provides the state's authorization to the claimants to use the subject property for the use described in this report, subject to the standards in effect on June

3, 2003, for Roy Pondelick and subject to the standards in effect on October 30, 2003, for Tana and Neal Pondelick. On those dates, the property was subject to the applicable provisions of Goal 4, ORS 215 and OAR 660, division 6, currently in effect.

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

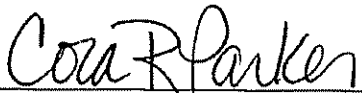
4. Any use of the subject property by the claimants under the terms of the order will remain subject to the following laws: (a) those laws not specified in (1) above; (b) any laws enacted or enforced by a public entity other than the Commission or the department; and (c) those laws not subject to ORS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

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

This Order is entered by the Deputy 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 Director 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



Cora R. Parker, Deputy Director  
DLCD

Dated this 5<sup>th</sup> day of September, 2006.

FOR the DEPARTMENT OF  
ADMINISTRATIVE SERVICES:



Lindsay A. Ball, Director  
DAS

Dated this 5<sup>th</sup> day of September, 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 197.352, the present owner of the property, or any interest therein, shall have a cause of action in the circuit court in which the real property is located.

(Copies of the documents that comprise the record are available for review at the Department's office at 635 Capitol Street NE, Suite 150, Salem, Oregon 97301-2540)

### **FOR INFORMATION ONLY**

The Oregon Department of Justice has advised the Department of Land Conservation and Development that "[i]f the current owner of the real property conveys the property before the new use allowed by the public entity is established, then the entitlement to relief will be lost."

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

September 5, 2006

**STATE CLAIM NUMBER:** M124300

**NAMES OF CLAIMANTS:** Roy, Tana and Neal Pondelick  
Trustees of Pondelick Family Trust

**MAILING ADDRESS:** PO Box 343  
Murphy, Oregon 97533

**PROPERTY IDENTIFICATION:** Township 37S, Range 6W, Section 13A  
Tax lot 3100  
Josephine County

**OTHER CONTACT INFORMATION:** Walter L. Cauble  
Cauble, Dole & Sorenson  
PO Box 398  
Grants Pass, Oregon 97528

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

**180-DAY DEADLINE:** September 9, 2006

**I. SUMMARY OF CLAIM**

The claimants, Roy, Tana and Neal Pondelick, seek compensation in the amount of \$965,000 for the reduction in fair market value as a result of land use regulations that are alleged to restrict the use of certain private real property. The claimants desire compensation or the right to divide the 38.79-acre subject property into two parcels and to develop a dwelling on one parcel.<sup>1</sup> The subject property is located at 507 Hidden Valley Road, near Grants Pass, in Josephine County. (See claim.)

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<sup>1</sup> Under ORS 197.352(8), if a public entity elects to not apply one or more land use regulations to the claimants' use of the property, it may do so only to allow "a use." Further, in order to determine that land use regulations have restricted the claimants' use of the property, the department must base that determination on a use. The department makes every effort to determine what use of the property the claimants seek to carry out, but in circumstances where the claimants refuse to state what use is sought, the department will assume that the desired use is to divide each parcel into one additional parcel and to establish one dwelling on the new parcel. If the claimants wish to make a claim for a different use, the claimants are free to submit a new 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 Roy, Tana and Neal Pondelick's division of the 38.79-acre subject property into two parcels and to their development of a dwelling on one parcel: applicable provisions of Statewide Planning Goal 4 (Forest Lands), ORS 215 and Oregon Administrative Rules (OAR) 660, division 6, enacted or adopted after each claimant acquired the subject property. These laws will not apply to the claimants only to the extent necessary to allow them to use the subject property for the use described in this report, and only to the extent that use was permitted when Roy Pondelick acquired the property on June 3, 2003, and when Tana and Neal Pondelick acquired the property on October 30, 2003. The department acknowledges that the relief to which the claimants are entitled under ORS 197.352 will not allow the claimants to use the subject property in the manner set forth in the claim. (See the complete recommendation in Section VI of this report.)

## III. COMMENTS ON THE CLAIM

### Comments Received

On May 19, 2006, pursuant to OAR 125-145-0080, the Oregon Department of Administrative Services (DAS) provided written notice to the owners of surrounding properties. According to DAS, three written comments were received in response to the 10-day notice.

The comments do not address whether the claim meets the criteria for relief under ORS 197.352. Comments concerning the effects a use of the property may have on surrounding areas are generally not something that the department is able to consider in determining whether to waive a state law. If funds do become available to pay compensation, then such effects may become relevant in determining which claims to pay compensation for instead of waive a state law. (See the comment letters in the department's claim file.)

## IV. TIMELINESS OF CLAIM

### Requirement

ORS 197.352(5) requires that a written demand for compensation be made:

1. For claims arising from land use regulations enacted prior to the effective date of Measure 37 (December 2, 2004), within two years of that effective date, or the date the public entity applies the land use regulation as an approval criteria to an application submitted by the owner, whichever is later; or
2. For claims arising from land use regulations enacted after the effective date of Measure 37 (December 2, 2004), within two years of the enactment of the land use regulation, or the date the owner of the property submits a land use application in which the land use regulation is an approval criteria, whichever is later.

### **Findings of Fact**

This claim was submitted to DAS on March 13, 2006, for processing under OAR 125, division 145. The claim identifies Josephine County Woodlot Resource (WR) zoning and Goal 4 as the basis for the claim. Only laws that were enacted or adopted prior to December 2, 2004, are the basis for this claim.

### **Conclusions**

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

## **V. ANALYSIS OF CLAIM**

### **1. Ownership**

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

### **Findings of Fact**

Claimant Roy Pondelick acquired the subject property on June 3, 2003, as reflected by a deed included with the claim. Claimants Tana and Neal Pondelick acquired the subject property on October 30, 2003, also as reflected by a deed included with the claim. The claimants' parents, Albert and Adeline Pondelick, acquired the subject property on June 24, 1974, as evidenced by a warranty deed included with the claim. The Josephine County Assessor's Office confirms the claimants' current ownership of the subject property.

### **Conclusions**

Claimant Roy Pondelick is an "owner" of the subject property, as that term is defined by ORS 197.352(11)(C), as of June 3, 2003. Claimants Tana and Neal Pondelick are "owners" of the subject property as of October 30, 2003. The claimants' parents, Albert and Adeline Pondelick, are "family members," as defined by ORS 197.352(11)(A), and acquired the subject property on June 24, 1974.

### **2. The Laws That are the Basis for This Claim**

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

## Findings of Fact

The claim indicates that the claimants desire to divide the 38.79-acre subject property into two parcels and develop a dwelling on one parcel and that current land use regulations prohibit the desired use.

The claim is based generally on the applicable provisions of state law that require forest zoning. The claimants' property is zoned WR zone by Josephine County, as required by Goal 4, in accordance with ORS 215 and OAR 660, division 6, because the claimant's property is "forest land" under Goal 4. Goal 4 became effective on January 25, 1975, and requires that forest land be zoned for forest use (see statutory and rule history under OAR 660-015-0000(4)). The forest land administrative rules (OAR 660, division 6) became effective on September 1, 1982, and ORS 215.705 to 215.755 and 215.780 became effective on November 4, 1993 (Chapter 792, Oregon Laws 1993). OAR 660-006-0026 and 660-006-0027 were amended on March 1, 1994, to implement those statutes.

Together, ORS 215.705 to 215.755 and 215.780 and OAR 660, division 6, enacted or adopted pursuant to Goal 4, prohibit the division of forest land into parcels less than 80 acres and establish standards for development of dwellings on existing or proposed parcels on land zoned forest.

The claimants' family acquired the subject property on June 24, 1974, after the adoption of Senate Bill 100 (Chapter 80, Oregon Laws 1973), effective on October 5, 1973, but before the adoption of the statewide planning goals, effective on January 25, 1975. During the period between October 5, 1973, and January 25, 1975, ORS 197.175(1) and 197.280 (1973 editions) required, in addition to any local plan or zoning provisions, that cities and counties exercise their planning responsibilities in accordance with the interim land use planning goals set forth in ORS 215.515 (1973 edition). *Petersen v. Klamath Falls*, 279 Or 249 (1977); *see also, Meeker v. Board of Comm'rs*, 287 Or 665 (1979) (review of a subdivision is an exercise of planning responsibilities requiring application of the goals); *State Housing Council v. Lake Oswego*, 48 Or App. 525 (1981) (noting that while "[l]and use planning responsibility is not defined in ORS ch 197, the Supreme Court has interpreted that term as including annexation approvals, *subdivision approvals* [emphasis added] and partition approvals") citing *Petersen*, *Meeker* and *Alexanderson v. Polk County*, 285 Or 427 (1980). The claimants' desired use includes subdivision of their land. If the claimants' family had sought to create that use in 1974, as a matter of law, the use would have been subject to the interim planning goals at ORS 215.515.<sup>2</sup>

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<sup>2</sup> The "interim" land use goals are set forth in ORS 215.515(1)(a) to (j) (1973 edition) as follows: (a) "To preserve the quality of the air, water and land resources of the state," (b) "To conserve open space and protect natural and scenic resources," (c) "To provide for the recreational needs of citizens of the state and visitors," (d) "To conserve prime farm lands for the production of crops," (e) "To provide for the orderly and efficient transition from rural to urban land use," (f) "To protect life and property in areas subject to floods, landslides and other natural disasters," (g) "To provide and encourage a safe, convenient and economic transportation system including all modes of transportation: Air, water, rail, highway and mass transit and recognizing differences in the social costs in the various modes of transportation," (h) "To develop a timely, orderly and efficient arrangement of public facilities and services to serve as a framework for urban and rural development," (i) "To diversify and improve the economy of the state" and (j) "To ensure that the development of properties within the state is commensurate with the character and the physical limitations of the land." ORS 215.515 (1973 edition).

No information has been provided establishing whether or to what extent the claimants' desired division of the subject property for residential development complies with the interim planning goals set forth in ORS 215.515 (1973 edition) in effect at the time the claimants' family acquired the property on June 24, 1974.

### **Conclusions**

The current zoning requirements, minimum lot size and dwelling standards established by Goal 4, ORS 215.705 to 215.755 and 215.780 and OAR 660-006-0026 and OAR 660-006-0027, were all enacted or adopted after the claimants' family acquired the subject property in 1974 and do not allow the desired division or development of the property. However, the claim does not establish whether or to what extent the claimants' desired use of the subject property complies with the interim planning goals in effect when their family acquired the property on June 24, 1974.

### **3. Effect of Regulations on Fair Market Value**

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

### **Findings of Fact**

The claim includes an estimate of \$965,000 as the reduction in the subject property's fair market value due to the regulations that restrict the claimants' desired use of the property. This amount is based on an opinion of value by a realtor, based on his compilation of a comparative market analysis.

### **Conclusions**

As explained in Section V.(1) of this report, the claimants are Roy, Tana and Neal Pondelick whose family members acquired the subject property in 1974. Under ORS 197.352, the claimants are due compensation for land use regulations that restrict the use of the property and have the effect of reducing its fair market value. Based on the findings and conclusions in Section V.(2) of this report, laws enacted or adopted since the claimants' family acquired the subject property restrict the claimants' desired use of the property. The claimants estimate that the effect of the regulations on the fair market value of the subject property is a reduction of \$965,000.

Without an appraisal or other documentation, it is not possible to substantiate the specific dollar amount by which the land use regulations have reduced the fair market value of the subject property. Nevertheless, based on the evidence in the record for this claim, the department determines that the fair market value of the subject property has been reduced to some extent as a result of land use regulations enforced by the Commission or the department since the claimants' family acquired the property.

#### **4. Exemptions Under ORS 197.352(3)**

ORS 197.352 does not apply to certain land use regulations. In addition, under ORS 197.352(3), certain types of laws are exempt from ORS 197.352.

#### **Findings of Fact**

The claim is based on state land use regulations that restrict the use of the subject property relative to the uses permitted when the claimants' family acquired the property, including applicable provisions of Goal 4, ORS 215 and OAR 660, division 6, which Josephine County has implemented through its current WR zone. With the exception of provisions of ORS 215, including the interim statewide planning goals, in effect on June 24, 1974, these state land use regulations were not in effect when the claimants' family acquired the property.

#### **Conclusions**

It appears that, with the exception of the provisions of ORS 215, including the interim planning goals in effect on June 24, 1974, none of the general statutory, goal and rule restrictions on residential division and development of the subject property were in effect when the claimants' family acquired the property on June 24, 1974. As a result, these laws are not exempt under ORS 197.352(3)(E). Laws in effect when the claimants' family acquired the subject property are exempt under ORS 197.352(3)(E) and do not provide a basis for compensation. In addition, other land use laws enacted or adopted for a purpose set forth in ORS 197.352(3)(A) to (D) are also exempt and would not provide a basis for compensation.

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 and for surrounding forest lands. ORS 197.352(3)(B) specifically exempts regulations "restricting or prohibiting activities for the protection of public health and safety, such as fire and building codes. . . ." Accordingly, the siting standards for dwellings in forest zones in ORS 215.730 and OAR 660, division 6, are exempt under ORS 197.352(3)(B).

### **VI. FORM OF RELIEF**

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

#### **Findings of Fact**

Based on the findings and conclusions set forth in this report, laws enforced by the Commission or the department restrict the claimants' desired use of the subject property. The claim asserts that existing state land use regulations enforced by the Commission or the department have the

effect of reducing the fair market value of the subject property by \$965,000. However, because the claim does not provide an appraisal or other relevant evidence demonstrating that the land use regulations described in Section V.(2) reduce the fair market value of the subject property, a specific amount of compensation cannot be determined. In order to determine a specific amount of compensation due for this claim, it would also be necessary to verify whether or the extent to which the claimants' desired use of the subject property was allowed under the standards in effect when their family acquired the property. Nevertheless, based on the record for this claim, the department has determined that the laws on which the claim is based have reduced the fair market value of the subject property to some extent.

No funds have been appropriated at this time for the payment of claims. In lieu of payment of compensation, ORS 197.352 authorizes the department to modify, remove or not apply all or parts of certain land use regulations to allow the claimants to use the subject property for a use permitted at the time Roy Pondelick acquired the property on June 3, 2003, and Tana and Neal Pondelick acquired the property on October 30, 2003.

At the time the claimants acquired the subject property, it was zoned WR by Josephine County and subject to the current lot size and dwelling standards under Goal 4, ORS 215 and OAR 660, division 6, and as described in Section V.(2) of this report.

In addition to the applicable provisions of Goal 4, ORS 215 and OAR 660, division 6, in effect on June 3 and October 30, 2003, there may be other laws that apply to the claimants' use of the property that have not been identified in the claim. This report addresses only those state laws that are identified in the claim, or that the department is certain apply to the subject property based on the uses that the claimants have identified. Similarly, this report only addresses the exemptions provided for under ORS 197.352(3) that are clearly applicable given the information provided to the department in the claim. The claimants should be aware that the less information they have provided to the department in their claim, the greater the possibility that there may be additional laws that will later be determined to continue to apply to their use of the subject property.

### **Conclusions**

Based on the record, the department recommends that the claim be approved, subject to the following terms:

1. In lieu of compensation under ORS 197.352, the State of Oregon will not apply the following laws to Roy, Tana and Neal Pondelick's division of the 38.79-acre subject property into two parcels or to their development of a dwelling on one parcel: applicable provisions of Goal 4, ORS 215 and OAR 660, division 6, enacted or adopted after each claimant acquired the subject property. These laws will not apply to the claimants only to the extent necessary to allow them to use the subject property for the use described in this report, and only to the extent that use was permitted when Roy Pondelick acquired the property on June 3, 2003, and when Tana and Neal Pondelick acquired the property on October 30, 2003. The department acknowledges that the relief to which the claimants are entitled under ORS 197.352 will not allow the claimants to use the subject property in the manner set forth in the claim.

2. The action by the State of Oregon provides the state's authorization to the claimants to use the subject property for the use described in this report, subject to the standards in effect on June 3, 2003, for Roy Pondelick and subject to the standards in effect on October 30, 2003, for Tana and Neal Pondelick. On those dates, the property was subject to the applicable provisions of Goal 4, ORS 215 and OAR 660, division 6, currently in effect.

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

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

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

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

The department issued its draft staff report on this claim on August 17, 2006. OAR 125-145-0100(3), provided an opportunity for the claimants or the claimants' authorized agent and any third parties who submitted comments under OAR 125-145-0080 to submit written comments, evidence and information in response to the draft staff report and recommendation. Comments received have been taken into account by the department in the issuance of this final report.

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**CERTIFICATE OF SERVICE**

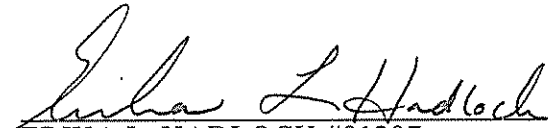
I certify that on January 25, 2007, I served the foregoing *State Respondents' Motion to Strike and Memorandum in Support of State Respondents' Motion to Strike* upon the parties hereto by the method indicated below, and addressed to the following:

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