

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

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

March 13, 2006

STATE CLAIM NUMBER: M118364

NAME OF CLAIMANT: Susan K. Peters

MAILING ADDRESS: 100 Southeast Harvey #5
Portland, Oregon 97202

IDENTIFICATION OF PROPERTY: Township 2S, Range 3E, Section 20B
Tax Lot 2000
Clackamas County

DATE RECEIVED BY DAS: May 5, 2005

180-DAY DEADLINE: March 20, 3006¹

I. CLAIM

The claimant, Susan K. Peters, seeks compensation in the amount of \$795,878.70 for a reduction in fair market value of property as a result of certain land use regulations that are alleged to restrict her use of the property. The claimant desires compensation or the right to partition the 7-acre property into ten residential building sites. The property is located on South Stevens Road N, near Carver in Clackamas County. (See claim.)

II. SUMMARY OF STAFF RECOMMENDATION

Based on the findings and conclusions set forth below, the Department of Land Conservation and Development (the department) has determined that this claim is valid. Department staff recommends, in lieu of compensation, that the requirements of the following laws enforced by the Land Conservation and Development Commission (the Commission) or the department not apply the following law to the claimant to allow her to divide the subject property: the applicable provisions of OAR 660-004-0040. This rule will not apply to the claimant's division of the subject property only to the extent necessary to allow her to use the property as described in this report, and only to the extent that use was permitted at the time she acquired the property on August 26, 1976. (See the complete recommendation in Section VI. of this report.)

¹ This date reflects 180 days from the date the claim was submitted as extended by the 139 days enforcement of Measure 37 was suspended during the pendency of the appeal of Macpherson v. Dep't of Admin. Servs., 340 Or ___, 2006 Ore. LEXIS 104 (February 21, 2006).

III. COMMENTS RECEIVED

On May 19, 2005, pursuant to OAR 125-145-0080, the Oregon Department of Administrative Services (DAS) provided written notice to owners of surrounding properties. In response to the 10-day notice², DAS received ten comment letters.

Nine of the comment letters do not address whether the claim meets the criteria for relief (compensation or waiver) under ORS 197.352. Comments concerning the effects a use of the property may have on surrounding areas generally are 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 waiving a state law.

One of the comment letters is relevant to whether a state law restricts the claimant's use of the property and whether the restriction of the claimant's use of the property reduces the fair market value of the property. The comments have been considered by the department in preparing this report. (See 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 the Measure (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 the Measure (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 May 5, 2005, for processing under OAR 125, division 145. The claim identifies Clackamas County's Rural Residential Farm Forest 5-Acres (RRFF-5) zoning that restricts the use of the property as the basis for the claim. Only laws that were enacted prior to December 2, 2004, the effective date of Measure 37, are the basis for this claim. (See citations of statutory and administrative rule history of the Oregon Revised Statutes and Oregon Administrative Rules.)

² The 10-day notice period was suspended for 139 days during the pendency of the *Macpherson v. Dep't of Admin. Servs.*, 340 Or ___, 2006 Ore. LEXIS 104 (February 21, 2006), which suspended all Measure 37 deadlines.

Conclusions

The claim has been submitted within two years of December 2, 2004, the effective date of Measure 37, based on land use regulation 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

According to the claim, Susan Peters, acquired the subject property on August 26, 1976 by a Land Sales Contract (Clackamas County Deed Records 76 29841). On November 29, 1990, the claimant transferred the subject property to the Susan Peters Revocable Trust, with herself as Trustee. (Clackamas County Deed records 99-111394). The transfer of the property into a revocable trust does not constitute a change in ownership for purposes of ORS 197.352. The most recent tax statement for the property indicates that the Susan Peters Trust is the current owner of the subject property.

Conclusions

The claimant, Susan Peters, is an “owner” of the subject property as that term is defined in ORS 197.352(11). Susan Peters acquired the property on August 26, 1976.

2. The Laws that are the Basis for the Claim

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

Findings of Fact

The claim states that land use regulations resulted in “9 potential building sites reduced to one building site.” According to the claimant, when she acquired the property in 1976, it was zoned R-30, which allowed 30,000 square foot lots. A subsequent zone change in 1979 RRFF-5 increased the minimum lot size to 5 acres.

The property is currently zoned RRFF-5, which is a rural residential designation under the Clackamas County Comprehensive Plan. The RRFF-5 zone requires a minimum of five acres

for the creation of new lots or parcels (Clackamas County Zoning Ordinance, Section 309.07.B). The subject property is seven acres and cannot be divided under the RRF-5 zone.

Statewide Planning Goal 14 (Urbanization) became effective on January 25, 1975, and required local comprehensive plans to provide for an orderly and efficient transition from rural to urban land use. The courts have found that Goal 14 generally prohibits residential development at urban densities on rural lands. Rural lands are lands outside of an urban growth boundary (UGB). As interpreted by the courts and the Commission, Goal 14 generally prohibits residential development outside of an urban growth boundary where lot or parcel sizes are less than 2 acres. (See, e.g. *1000 Friends of Oregon v. LCDC (Curry County)*, 301 Or 447 (1986); *DLCD v. Klamath County*, 38 Or LUBA 769 (2000).) As a result of the 1986 *Curry County Oregon* Supreme Court decision, the Commission amended Statewide Planning Goal 14 (Urbanization) and adopted OAR 660-004-0040, establishing rules for rural residential development outside urban growth boundaries, which became effective on October 4, 2000. The rule provides among other things that after October 4, 2000 any lot or parcel to be divided that is less than one mile from the urban growth boundary for the Portland metropolitan area and is in a Rural Residential area must have a the minimum size of 20 acres (OAR 660-004-0040(8)(e)).³

The subject property is located within one-mile of the urban growth boundary for the Portland metropolitan area and is subject to the 20-acre minimum lot size standard under OAR 660-004-0040(8)(e), applicable to rural residential areas located within one-mile of the urban growth boundary.⁴

When the claimant acquired the subject property in 1976, it was zoned Urban Low Density Residential, (R-30) which established a 30,000 square foot minimum parcel size for the creation of new lots or parcels.⁵ However, this zoning was not acknowledged by the Commission under the standards for state approval of local comprehensive plans and land use regulations pursuant to ORS 197.250 and 197.251. Because the Commission had not acknowledged Clackamas County's plan and land use regulations when the claimant acquired the property in 1976, the Statewide Planning Goals, particularly Goal 14, applied directly to the division of the property.⁶

³ The Portland metropolitan service area does not have an urban reserve area acknowledged to comply with OAR 660, division 21. Therefore, the provisions under OAR 660-004-0040(d) exempting lots or parcels from the 20-acre standard do not apply.

⁴ In 2002, the Metro UGB was expanded southeasterly from its previous location to include Carver and lands further east to SE Tong Road and south to the Clackamas River. That action resulted in the subject property being located approximately 2,000 feet south of the UGB. (Source: Metro UGB Map, December 2002; City Boundaries in the Damascus/Boring Concept Study Area, Clackamas County; and Assessor Maps 2 3E 17, 2 3E 18 and 2 3E 9).

⁵ The property was rezoned to Rural Residential Farm Forest 5 acres (RRFF-5) on August 23 1979. Source: Clackamas County Measure 37 Staff Report, April 2, 2005, ZC080-05/Peters.

⁶ The Statewide Planning Goals became effective on January 25, 1975, and were applicable to legislative land use decisions and some quasi-judicial land use decisions prior to the Commission's acknowledgment of the County's plan and implementing regulations. (*Sunnyside Neighborhood Assn. v. Clackamas County*, 280 Or 3 (1977), *1000 Friends of Oregon v. Benton County*, 32 Or App 413 (1978), *Jurgenson v. Union County*, 42 Or App 505 (1979),

The claim does not establish whether the level of development requested by the claimant would have been permitted under the laws in effect in 1976 when the claimant acquired the property.

Conclusions

The minimum lot size for rural residential lots or parcels established by OAR 660-004-0040 were enacted after the claimant acquired the subject property in 1976, and do not allow the division of the property, thereby restricting the use of the property relative to the uses allowed when the property was acquired by the claimant in 1976. When the claimant acquired the subject property in 1976, the Statewide Planning Goals, and in particular the general requirements of Statewide Planning Goal 14 (Urbanization), applied directly to the property. As interpreted by the Commission (OAR 660-040-0040), Goal 14 generally required a minimum lot size of at least two acres.

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

3. Effect of Regulations on Fair Market Value

In order to establish a valid claim, ORS 197.352(1) requires that any laws 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 \$795,878.70 as the reduction in the property's fair market value due to current regulations. This amount is based on real market value from Clackamas County Tax Statements of comparable "Jr." acre sites (sites in adjacent subdivision) compared to the subject property as one parcel.

The claim includes current Clackamas County Tax Statements for the subject property and four other properties. No appraisal was provided regarding the reduction in the fair market value.

Alexanderson v. Polk County, 289 Or 427, rev den, 290 Or 137 (1980), and *Perkins v. City of Rajneeshpuram*, 300 Or 1 (1985)). After the County's plan and land use regulations were acknowledged by Commission, the Statewide Planning Goals and implementing rules no longer directly applied to such local land use decisions, (*Byrd v. Stringer*, 295 Or 311, (1983)). However, statutory requirements continue to apply, and insofar as the state and local provisions are materially the same in substance, the applicable rules must be interpreted and applied by the County in making its decision. *Forster v. Polk County*, 115 Or App 475 (1992) and *Kenagy v. Benton County*, 115 Or App 131 (1992).

Conclusions

As explained in Section V.(1) of this report, the current owner is Susan Peters, who acquired the property on August 26, 1976. Under ORS 197.352, Susan Peters is due compensation for land use regulations that restrict the use of the subject property in a manner that reduces its fair market value. Based on the findings and conclusions in Section V.(2) of the report, land use regulations adopted since the claimant acquired the property may restrict the division of the subject property to some extent. The claimant states that the reduction due to the inability to divide the property is \$795,878.70.

Without an appraisal or other documentation, and without verification regarding the extent to which the property could be divided in 1976, it is not possible to substantiate the specific dollar amount the claimant demands for compensation. Nevertheless, based on the submitted information, the department determines that it is more likely than not that there has been some reduction in the fair market value of the subject property as a result of laws enforced by the Commission or the department.

4. Exemptions under ORS 197.352(3)

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

Findings of Fact

The claim is based on land use regulations that restrict the use of the claimant's property relative to uses permitted when she acquired the property in 1976. These regulations include Goal 14 and OAR 660-004-0040, which set forth the requirements for the creation of new lots or parcels in rural residential areas. Goal 14 was in effect when the claimant acquired the property and, therefore, is exempt under ORS 197.352(3)(E), which exempts laws in effect when the claimant acquired the property. The provisions of OAR 660-004-0040 took effect in 2000, after the claimant acquired the property and these provisions are not exempt under ORS 197.352(3)(E).

The subject property includes land within the floodplain and floodway of the Clackamas River. ORS 197.352(3)(B) and (C) exempt regulations enacted to protect public health and safety and regulations required by federal law, respectively. To the extent that the floodplain and floodway designations constitute regulations to protect public health and safety, or are required under provisions of federal laws, those regulations are exempt under ORS 197.352(3)(B) and (C) and will continue to apply to the claimant's use of the property.⁷

⁷ Statewide Planning Goal 7 requires local government to identify areas of natural hazards and to adopt ordinances to protect people and property from such hazards. Clackamas County has applied Zoning Ordinance Section 703, Floodplain Management District, to areas of the subject property identified as special flood hazard areas.

Conclusions

Without a specific development proposal for the property, it is not possible for the department to determine what laws may apply to a particular use of the property, or whether those laws may fall under one or more of the exemptions under ORS 197.352. It does appear that the general goal and rule restrictions on residential divisions apply to the claimant's use of the property, and these laws are not exempt under ORS 197.352(3)(E) to the extent they were adopted after the claimant acquired the property. Provisions of Goal 14 in effect when the claimant acquired the property in 1976 are exempt under ORS 197.352(3)(E) and will continue to apply to the property.

Other laws in effect when the claimant acquired the property are also exempt under ORS 197.352(3)(E) and will continue to apply to the claimant's use of the property under specified circumstances. In addition, regulations limiting development in the designated flood hazard areas may be exempt under ORS 197.352(3)(B) or (D). There may be other laws that continue to apply to the claimant's use of the property that have not been identified in the claim. In some cases it will not be possible to know what laws apply to a use of property until there is a specific proposal for that use. When the claimant seeks a building or development permit to carry out a specific use, it may become evident that other state laws apply to that use. And, in some cases, some of these laws may be exempt under ORS 197.352(3)(A) to (D).

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

VI. FORM OF RELIEF

ORS 197.352(1) provides for payment of compensation to an owner of private real property if the Commission or department has enforced a law that restricts 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 to allow the present owner to carry out a use of the property allowed at the time the current owner acquired the property. The Commission has by rule directed that if the department determines a claim is valid, the Director must provide only non-monetary relief unless and until funds are appropriated by the legislature to pay claims.

Findings of Fact

Based on the record before the department, laws enforced by the Commission or the department restrict the division of the property. The claim asserts the laws enforced by the Commission or the department reduce the fair market value of the subject property by \$795,878.70. Without an appraisal, or other documentation, and without verification regarding the extent to which the property could be divided in 1976, it is not possible to substantiate the specific dollar amount the

claimant demands for compensation. Nevertheless, based on the submitted information, the department determines that it is more likely than not that there has been some reduction in the fair market value of the subject property as a result of land use regulations.

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 Susan Peters to use the subject property for a use permitted at the time she acquired the property on August 26, 1976.

Conclusion

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

1. In lieu of compensation, the State of Oregon will not apply the requirements of the following law enforced by the Commission or the department to the claimant's division of subject property: the applicable provisions of OAR 660-004-0040 in effect after August 26, 1976. This rule will not apply to the claimant's division of the subject property only to the extent necessary to allow her to use the property as described in this report, and only to the extent that the use was permitted when she acquired the property on August 26, 1976.
2. The action by the State of Oregon provides the state's authorization to the claimant to use the property subject to the standards in effect on August 26, 1976. On that date, the property was subject to applicable provisions of Statewide Planning Goal 14, in effect at that time, which requires a minimum parcel size of at least two acres.
3. To the extent that any law, order, deed, agreement or other legally enforceable public or private requirement provides that the property may not be used without a permit, license, or other form of authorization or consent, the order will not authorize the use of the property unless the claimant first obtains that permit, license or other form of authorization or consent. Such requirements may include, but are not limited to: a building permit, a land use decision, a permit as defined in ORS 215.402 or ORS 227.160, other permits or authorizations from local, state or federal agencies, and restrictions on the use of the property imposed by private parties.
4. Any use of the property by the claimant under the terms of the order will remain subject to the following laws: (a) those laws not specified in (1) above; (b) any laws enacted or enforced by a public entity other than the Commission or the department; and (c) those laws not subject to ORS 197.352 including, without limitation, those laws exempted under ORS 197.352(3).
5. Without limiting the generality of the foregoing terms and conditions, in order for the claimant to use the property, it may be necessary for her to obtain a decision under ORS 197.352 from a city and/or county and/or metropolitan service district that enforces land use regulations applicable to the property. Nothing in this order relieves the claimant from the necessity of obtaining a decision under ORS 197.352 from a local public entity that has jurisdiction to enforce a land use regulation applicable to a use of the property by the claimant.

VII. . COMMENTS ON THE DRAFT STAFF REPORT

The department issued its draft staff report on this claim on October 7, 2005. OAR 125-145-0100(3), provided an opportunity for the claimant or the claimant's authorized agent and any third parties who submitted comments under OAR 125-145-0080 to submit written comments, evidence and information in response to the draft staff report and recommendation. Comments received have been taken into account by the department in the issuance of this final report.

BEFORE THE DEPARTMENT OF ADMINISTRATIVE SERVICES,
THE DEPARTMENT OF LAND CONSERVATION AND DEVELOPMENT OF
THE STATE OF OREGON

IN THE MATTER OF THE CLAIM FOR)	FINAL ORDER
COMPENSATION UNDER ORS 197.352)	CLAIM NO. M118364
(BALLOT MEASURE 37) OF)	
Susan K. Peters, CLAIMANT)	

Claimants: Susan K. Peters (the Claimant)

Property: TL 2000, T 2S, R 3E, S 20B, Clackamas County (the Property)

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

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

ORDER

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

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

1. In lieu of compensation, the State of Oregon will not apply the requirements of the following law enforced by the Commission or the department to the claimant's division of subject property: the applicable provisions of OAR 660-004-0040 in effect after August 26, 1976. This rule will not apply to the claimant's division of the subject property only to the extent necessary to allow her to use the property as described in this report, and only to the extent that the use was permitted when she acquired the property on August 26, 1976.
2. The action by the State of Oregon provides the state's authorization to the claimant to use the property subject to the standards in effect on August 26, 1976. On that date, the property was subject to applicable provisions of Statewide Planning Goal 14, in effect at that time, which requires a minimum parcel size of at least two acres.

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

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

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

This Order is entered by the Director of the DLCD as a final order of DLCD and the Land Conservation and Development Commission under ORS 197.352, OAR 660-002-0010(8), and OAR 125, division 145, and by the Administrator for the State Services Division of the DAS as a final order of DAS under ORS 197.352, OAR 125, division 145, and ORS 293.

FOR DLCD AND THE LAND CONSERVATION
AND DEVELOPMENT COMMISSION:



Lane Shetterly, Director
DLCD

Dated this 13th day of March, 2006.

FOR the DEPARTMENT OF ADMINISTRATIVE
SERVICES:



David Hartwig, Administrator
DAS, State Services Division

Dated this 13th day of March, 2006.

NOTICE OF RIGHT TO APPEAL OR OTHER JUDICIAL RELIEF

You are entitled, or may be entitled, to the following judicial remedies:

1. **Judicial review under ORS 293.316:** Judicial review under ORS 293.316 may be obtained by filing a petition for review within 60 days from the service of this order. Judicial review under ORS 293.316 is pursuant to the provisions of ORS 183.482 to the Court of Appeals.
2. **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 and the Circuit Court in the county in which you reside.
3. **A cause of action under ORS 197.352:** A present owner of the property, or any interest therein, may file a cause of action in the Circuit Court for the county where the property is located, if a land use regulation continues to apply to the subject property more than 180 days after the present owner made a written demand for compensation.

(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.”