

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. M118405
(BALLOT MEASURE 37) OF	)	
Gerald and Kathy Bennett, CLAIMANTS	)	

Claimants: Gerald and Kathy Bennett (the Claimants)

Property: Tax lot 1100, Township 6S, Range 2W, Section 22, Marion 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 Gerald and Kathy Bennett's division of the 5.38-acre property into three parcels or to their establishment of a single-family dwelling on each parcel created: applicable provisions of Statewide Planning Goal 3; Statewide Planning Goal 14; ORS 215; and OAR 660, division 33. These land use regulations will not apply to the Bennetts' use of their property only to the extent necessary to allow the claimants to use the property for the use described in this report, as permitted at the time they acquired the property on April 9, 1973.
2. The action by the State of Oregon provides the state's authorization to the claimants to use their property for the use described in this report, subject to the standards in effect on April 9, 1973. On that date, the property may have been subject to applicable provisions of ORS 215 then in effect.

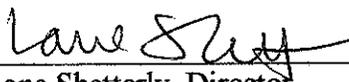
3. To the extent that any law, order, deed, agreement or other legally enforceable public or private requirement provides that the property may not be used without a permit, license, or other form of authorization or consent, the order will not authorize the use of the property unless the claimants first 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 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 claimants under the terms of the order will remain subject to the following laws: (a) those laws not specified in Condition 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 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 property by the claimants.

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

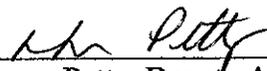
FOR DLCD AND THE LAND CONSERVATION  
AND DEVELOPMENT COMMISSION:



Lane Shetterly, Director  
DLCD

Dated this 20th day of March, 2006.

FOR the DEPARTMENT OF ADMINISTRATIVE  
SERVICES:



Dugan Petty, Deputy Administrator  
DAS, State Services Division

Dated this 20th 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."

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

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

March 20, 2006

**STATE CLAIM NUMBER:** M118405

**NAMES OF CLAIMANTS:** Gerald and Kathy Bennett

**MAILING ADDRESS:** 7477 Brooklake Road NE  
Salem, Oregon 97305

**PROPERTY IDENTIFICATION:** Township 6S, Range 2W, Section 22  
Tax lot 1100  
Marion County

**DATE RECEIVED BY DAS:** May 10, 2005

**180-DAY DEADLINE:** March 25, 2006<sup>1</sup>

**I. SUMMARY OF CLAIM**

The claimants, Gerald and Kathy Bennett, seek compensation in the amount of \$300,000 for the reduction in fair market value as a result of certain 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 5.38-acre property into three parcels and to develop a dwelling on each parcel. The property is located at 7477 Brooklake Road, near Salem, in Marion County. (See claim.)

**II. SUMMARY OF STAFF RECOMMENDATION**

Based on the findings and conclusions set forth below, the Department of Land Conservation and Development (the department) has determined that the claim is valid. Department staff recommends that, in lieu of compensation, the requirements of the following state laws enforced by the Land Conservation and Development Commission (the Commission) or the department not apply to the Bennetts' division of the property into three parcels or to their development of a dwelling on each parcel: applicable provisions of Statewide Planning Goals 3 (Agricultural Lands); and 14 (Urbanization); ORS 215; and OAR 660 division 33. These laws will not apply to the claimants only to the extent necessary to allow them to use the property for the use described in this report, as permitted at the time they acquired it in 1973. (See the complete recommendation in Section VI of this report.)

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<sup>1</sup> 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 ON THE CLAIM**

#### **Comments Received**

On June 1, 2005, pursuant to OAR 125-145-0080, the Oregon Department of Administrative Services (DAS) provided written notice to the owners of surrounding properties. According to DAS, three written comments were received in response to the 10-day notice.<sup>2</sup>

Two of the comments are relevant to whether the claimants are owners and whether a state law restricts the claimants' use of the property. These comments have been considered by the department in preparing this report.

A third comment received does 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. (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 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 May 10, 2005, for processing under OAR 125, division 145. The claim identifies Marion County rural zoning ordinance (Chapter 136), ORS 215, ORS 227, ORS 197, ORS 92, and provisions of OAR 660 as laws that restrict the use of the property as the basis for the claim. Only laws that were enacted prior to December 2, 2004, the

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<sup>2</sup> 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.

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.)

### **Conclusions**

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

## **V. ANALYSIS OF CLAIM**

### **1. Ownership**

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

### **Findings of Fact**

The claimants, Gerald and Kathy Bennett, acquired the subject property on April 9, 1973, as reflected by a land sale contract included with the claim. The claimants obtained a Warranty Deed for the subject property in fulfillment of the contract on March 7, 1984. A copy of a 2004-2005 Marion County real property tax statement indicates that Mr. and Ms. Bennett are the current owners of the subject property.

### **Conclusions**

The claimants, Gerald and Kathy Bennett, are “owners” of the subject property, as that term is defined by ORS 197.352(11)(C), as of April 9, 1973.

### **2. The Laws that are the Basis for this Claim**

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

### **Findings of Fact**

The claimants seek to divide their 5.38-acres into three parcels of between 1.38 and 2.0 acres in size and to “add dwellings.” The claim states that current Marion County zoning (Chapter 136 - Rural Zoning Ordinance) restricts the use of the property, and includes a list of state administrative rules and statutes including: OAR 660, ORS 92, ORS 197, ORS 215 and ORS 227.<sup>3</sup>

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<sup>3</sup> The claim does not assert how these state land use regulations restrict the use of the property in a manner that reduces the fair market value of the property. Several of these statutes and rules are either not applicable to the

The claim is based, generally, on Marion County's current Exclusive Farm Use (EFU) zone and the applicable provisions of state law that require such zoning. The claimants' property is zoned EFU as required by Goal 3, in accord with OAR 660 division 33, and ORS 215 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 state land use regulations, particularly ORS 215.263, 215.284, 215.780 and OAR 660, division 33, as applied by Goal 3, generally, do not allow the subject property to be divided into parcels less than 80 acres and establish standards for allowing the existing or any proposed parcels to have farm or non-farm dwellings on them.

ORS 215.780 establishes an 80-acre minimum size for the creation of new lots or parcels in EFU zones and became effective November 4, 1993 (Chapter 792, Oregon Laws 1993). ORS 215.263 (2003 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. Subsequent amendments to comply with HB 3326 (Chapter 704, Oregon Laws 2001, and effective January 1, 2002,) were adopted by the Commission effective May 22, 2002. (See citations of administrative rule history for OAR 660-033-0100, 0130 and 0135.)

In addition, the density of the residential development that the claimants desire to carry out is likely greater than that allowed under Statewide Planning Goal 14 (Urbanization). The purpose of Goal 14 is to limit urban development to urban areas. The goal generally prohibits urban levels of development outside of urban growth boundaries. Residential development at a density of more than one home for every two acres has been found to be urban in nature.

The claimants acquired the subject property on April 9, 1973, prior to the establishment of the statewide planning goals and their implementing statutes and rules. Information from Marion County indicates the property was zoned Residential Agriculture (RA) at the time it was acquired by the claimants, which would have allowed the use proposed by the claimants. If the RA zone

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subject property or do not, on their face, restrict the use of the subject property. Except for the regulations addressed in this report, absent an explanation by the claimant as to how these land use regulations restrict the use of the claimant's property in a manner that reduces the property's fair market value; these regulations are not addressed further.

<sup>4</sup> The claimants' property is agricultural land because it contains Natural Resources Conservation Service (NRCS) Class I-IV soils. The subject property is composed of high value farmland soils based on the NRCS Soil Survey of Marion County Area, Oregon (Woodburn Sit Loan, 0-3 percent slopes, Iiw-1) (Map 19).

was a qualified agricultural zone under ORS 215, the provisions of ORS 215 enacted in 1963, would have applied to the property at the time the claimants acquired it.

### **Conclusions**

The zoning requirements, minimum lot size and dwelling standards established by Statewide Planning Goal 3 (Agricultural Lands), Statewide Planning Goal 14 (Urbanization), and provisions applicable to land zoned EFU in ORS 215 and OAR 660 division 33 were all enacted after Mr. and Ms. Bennett acquired ownership of the subject property in April 1973, 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. In 1973, the property was subject to the requirements of the County's RA zone. If that zone was a qualified agricultural zone under ORS 215, the provisions of ORS 215 then in effect would have applied to the property when the claimants acquired it.

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 claimants have identified. There may be other laws that currently apply to the claimants' use of the property, and that may continue to apply to the claimants' use of the property, that have not been identified in the claim. In some cases, it will not be possible to know what laws apply to a use of property until there is a specific proposal for that use. When a 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 land use regulation 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 claimants have estimated \$300,000 as the subject property's reduction in fair market reduction due to land use restrictions. The claim includes a Complete Summary Appraisal Report that provides an estimate of between \$125,000 and \$150,000 as the fair market value of each of the three parcels created if the property were divided, in the absence of current regulations.<sup>5</sup> According to the appraisal, the "as-is" current value of the subject property (land only) is between \$125,000 and \$150,000. The claim also includes a Marion County Real Property Tax Statement (2004-05) that shows the current real market value of the subject property with improvements to be approximately \$137,210.

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<sup>5</sup> Complete Summary Appraisal Report of the Property Located at 7477 Brooklake Road NE, Salem; produced by Mueller Residential Appraisal Services, Inc., April 20, 2005.

## **Conclusions**

As explained in Section V.(1) of this report, the current owners are Gerald and Kathy Bennett, who acquired the property on April 9, 1973. Under ORS 197.352, Mr. and Ms. Bennett are 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 this report, laws adopted since the claimants acquired the property restrict division of the subject property. The claimants estimate the reduction in value due to the restrictions to be \$300,000.

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 enforced by the Commission or the department.

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

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

### **Findings of Fact**

The claim is based on land use regulations that restrict the use of the property relative to what would have been allowed in April 1973, when the property was acquired by Gerald and Kathy Bennett. These provisions include Statewide Planning Goal 3 (Agricultural Lands), Statewide Planning Goal 14 (Urbanization), and applicable provisions of ORS 215 and OAR 660 division 33 which Marion County has implemented through its EFU zone. With the exception of any applicable provisions of ORS 215 in effect on April 9, 1973, none of these laws appear to be exempt under ORS 197.352(3)(E). If the property was in a qualified agricultural zone when the claimants acquired it, provisions of ORS 215 enacted before April 9, 1973, are exempt under ORS 197.352(3)(E).

### **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 appears that the general statutory, goal, and rule restrictions on residential development and use of farm land apply to the claimants' use of the property, and for the most part these laws are not exempt under ORS 197.352(3)(E). Depending on the local zoning in effect at the time claimants acquired the property, on April 9, 1973, the property may have been subject to applicable provisions of ORS 215 when the claimants acquired it. If applicable, provisions of ORS 215 in effect when the claimants acquired the property in 1973 are exempt under ORS 197.352(3)(E) and will continue to apply to the property.

Laws in effect when the claimants acquired the property are exempt under ORS 197.352(3)(E) and will continue to apply to the claimants' use of the property. There may be other laws that continue to apply to the claimants' use of the property that have not been identified in the claim.

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 claimants seek a building or development permit to carry out a specific use, it may become evident that other state laws apply to that use. 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 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 property.

## **VI. FORM OF RELIEF**

ORS 197.352(1) provides for payment of compensation to an owner of private real property if the Commission or the department has enforced 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 in order to allow the present owner to carry out a use of the property permitted at the time the current owner acquired the property. The Commission, by rule, has 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 findings and conclusions set forth in this report, laws enforced by the Commission or the department restrict the claimants' ability to divide the property into three parcels for residential development. The claim asserts the laws enforced by the Commission or department reduce the fair market value of the subject property by \$300,000. Based on the record for this claim, the department acknowledges that the laws on which the claim is based likely have reduced the fair market value of the 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 Gerald and Kathy Bennett to use the subject property for a use permitted at the time they acquired the property on April 9, 1973.

### **Conclusion**

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 Gerald and Kathy Bennett's division of the 5.38-acre property into three parcels or to their establishment of a single-family dwelling on each parcel created: applicable provisions of Statewide Planning Goal 3; Statewide Planning Goal 14; ORS 215; and OAR 660, division 33.

These land use regulations will not apply to the Bennetts' use of their property only to the extent necessary to allow the claimants to use the property for the use described in this report, as permitted at the time they acquired the property on April 9, 1973.

2. The action by the State of Oregon provides the state's authorization to the claimants to use their property for the use described in this report, subject to the standards in effect on April 9, 1973. On that date, the property may have been subject to applicable provisions of ORS 215 then in effect.

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 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 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 claimants under the terms of the order will remain subject to the following laws: (a) those laws not specified in Condition 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 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 property by the claimants.

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

The department issued its draft staff report on this claim on October 13, 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.