

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. M 118408
(BALLOT MEASURE 37) OF)
George and Myrna McGinnis, CLAIMANTS)

Claimants: George and Myrna McGinnis (the Claimants)

Property: Tax Lot 1000, T.7N, R.4W, Section 3, W.M., Columbia 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 just compensation, the State of Oregon will not apply the requirements of the following law to George and Myrna McGinnis' division of the subject property into three parcels: the applicable provisions of OAR 660-004-0040. This rule will not apply to the McGinnis' use of the subject property only to the extent necessary to allow them to use the property for the use described in this report, to the extent that use was permitted when they acquired the property on March 5, 1976.
2. The action by the State of Oregon provides the state's authorization to the claimants to use the property for the use described in this report, subject to the standards in effect on March 5, 1976. On that date, development of the property was subject to compliance with the Statewide Planning Goals, including applicable provisions of Statewide Planning Goal 14 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.

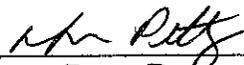
This Order is entered by the Director of the DLCD as a final order of DLCD and the Land Conservation and Development Commission under ORS 197.352, OAR 660-002-0010(8), and OAR 125, division 145, and by the Deputy Administrator for the State Services Division of the DAS as a final order of DAS under ORS 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: M118408

NAMES OF CLAIMANTS: George and Myrna McGinnis

MAILING ADDRESS: 77225 Rutter Road
P.O. Box 296
Clatskanie, Oregon 97016

IDENTIFICATION OF PROPERTY: Township 7N, Range 4W, Section 3
Tax lot 1000
Columbia County

DATE RECEIVED BY DAS: May 10, 2005

180-DAY DEADLINE: March 25, 2006¹

I. CLAIM

The claimants, George and Myrna McGinnis, seek compensation in the amount of \$60,000 for a reduction in fair market value of property 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 partition their 5.55-acre property into three parcels of between 1.5 and 2.0 acres each, for residential development. The property is located at 77225 Rutter Road, near Clatskanie, in Columbia 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 that, in lieu of compensation, the requirements of the following state law enforced by the Land Conservation and Development Commission (the Commission) or the department not apply to the McGinnis' division of the property into three parcels for residential development: the applicable provisions of OAR 660-004-0040. This rule will not apply to the claimants' use of the subject property only to the extent necessary to allow them to use the property for the use described in this report, to the extent that use was permitted at the time they

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).

acquired the property on March 5, 1976. (See the complete recommendation in Section VI. of this report.)

III. COMMENTS RECEIVED

On June 1, 2005, pursuant to OAR 125-145-0080, the Oregon Department of Administrative Services (DAS) provided written notice to owners of surrounding properties. According to DAS, one comment was received in response to the 10-day notice². The comment is relevant to whether the restriction of the claimants' 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 letter in the department's claim file.)

IV. TIMELINESS OF CLAIM

Requirement

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

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

Findings of Fact

This claim was submitted to DAS on May 10, 2005, for processing under OAR 125 division 145. The claim identifies Columbia County's Rural Residential 5-Acre (RR-5) zoning 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.)

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.

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.

V. ANALYSIS OF CLAIM

1. Ownership

ORS 197.352 provides for payment of compensation of 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

George and Myrna McGinnis acquired the subject property on March 5, 1976, as reflected by a Statutory Warranty Deed included with the claim. A title report dated March 23, 2005, states that George and Myrna McGinnis are current owners of the subject property.

Conclusions

The claimants, George and Myrna McGinnis, are “owners” of the subject property as that term is defined in ORS 197.352(11), as of March 5, 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 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 states that “zoning reduced the number of lots that the property could be divided into and no longer allowed two-acre parcels in a RR-5 zone.” Additional materials submitted with the claim indicate that the claimants desire to divide the 5.5-acre property, which is presently developed with two dwellings, into three parcels and to develop a dwelling on one of the resulting parcels.

The property is currently zoned Rural Residential-5 (RR-5), which is a rural residential designation under the Columbia County Comprehensive Plan, in accord with Statewide Planning Goal 14 (Urbanization). The RRFF-5 zone requires a minimum of five acres for the creation of new lots or parcels. The subject property is 5.5 acres and cannot be divided under the RR-5 zone.

Goal 14 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 that if, on October 4, 2000, a rural residential zone specifies a minimum lot size of two acres or more, the area of any new lot or parcel shall equal or exceed the minimum lot size which is already in effect (OAR 660-004-0040(7)(c)). Some relief from this provision is available for lots or parcels having more than one permanent habitable dwelling pursuant to OAR 660-004-0040(7)(h). The subject property currently has two dwellings on it.

When the claimants acquired the subject property in 1976, it was not zoned by Columbia County. At that time, the county's comprehensive plan and land use regulations had not yet been acknowledged by the Commission for compliance with the Statewide Planning Goals, pursuant to ORS 197.250 and 197.251. Because the Commission had not acknowledged Columbia County's plan and land use regulations when the claimants acquired the property in 1976, the statewide planning goals applied directly to the property³.

As stated above, at the time the claimants acquired the property, Goal 14 required that local comprehensive plans identify and separate urbanizable land from rural land, and has been held to prohibit residential development outside urban growth boundaries at urban densities, which have generally been held to consist of densities of less than 2 acres.

Conclusions

The zoning requirements, minimum lot size and dwelling standards for rural residential parcels established by OAR 660-004-0040 were enacted after the claimants 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 claimants acquired the property. When the claimants acquired the subject property in 1976, the Statewide Planning Goals, including the general requirements of Goal 14, applied directly to the property.

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

³ 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), *Alexanderson v. Polk County*, 289 Or 427, rev. denied, 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).

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.

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 states that there has been a reduction in the fair market value of the property of \$60,000 as a result of current regulations. It appears that the claim relies upon a comparison of value of the subject property to a nearby property to arrive at this estimate.

Conclusions

As explained in Section V.(1) of this report, the current owners are George and Myrna McGinnis, who acquired the property on March 5, 1976. Under ORS 197.352, the McGinnis' are due compensation for land use regulations that restrict the use of the subject property in a manner that reduces its fair market value. The claimants estimate that the reduction in value due to the restrictions is \$60,000.

Without an appraisal or other documentation, it is not possible to substantiate the specific dollar amount the claimants demand 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), 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 uses permitted when the claimants acquired the property on March 5, 1976, including Goal 14 and OAR 660-004-0040. Goal 14 was in effect when the claimants acquired the property and therefore, is exempt under ORS 197.352(3)(E), which exempts laws in effect when the claimants acquired the property. The provisions of OAR 660-004-0040 took effect in 2000, after the claimants acquired the property. As a result, that rule is not 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 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 claimants acquired the property. Provisions of Goal 14 in effect when the claimants 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 claimants acquired the property are also 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 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 present 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 restricts the division of the property into three parcels of between 1.5 and 2 acres. The claim asserts that these laws reduce the fair market value of the property by \$60,000. Without an appraisal or other documentation, it is not possible to substantiate the specific dollar amount the claimants demand 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 George and Myrna McGinnis to use the subject property for a use permitted at the time they acquired it on March 5, 1976.

Conclusion

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

1. In lieu of just compensation, the State of Oregon will not apply the requirements of the following law to George and Myrna McGinnis' division of the subject property into three parcels: the applicable provisions of OAR 660-004-0040. This rule will not apply to the McGinnis' use of the subject property only to the extent necessary to allow them to use the property for the use described in this report, to the extent that use was permitted when they acquired the property on March 5, 1976.
2. The action by the State of Oregon provides the state's authorization to the claimants to use the property for the use described in this report, subject to the standards in effect on March 5, 1976. On that date, development of the property was subject to compliance with the Statewide Planning Goals, including applicable provisions of Statewide Planning Goal 14 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.