

1982. On that date, the property was subject to applicable provisions of Statewide Planning Goals 3 and 14 and ORS 215 then in effect. The action by the State of Oregon provides the state's authorization to Gail Guyer to use the property for the use described in this report, subject to the standards in effect on March 22, 1995. On that date, the property was subject to applicable provisions of Statewide Planning Goal 14.

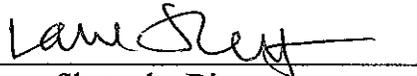
3. To the extent that any law, order, deed, agreement or other legally enforceable public or private requirement provides that the property may not be used without a permit, license, or other form of authorization or consent, the order will not authorize the use of the property unless the claimants first 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 (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.

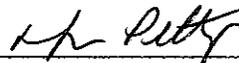
FOR DLCD AND THE LAND CONSERVATION
AND DEVELOPMENT COMMISSION:



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: M118415

NAMES OF CLAIMANTS: Ronald and Gail Guyer

MAILING ADDRESS: 977 SW 3rd Street
Ontario, OR 97914

PROPERTY IDENTIFICATION: Township 9S, Range 39E, Section 4
Tax lot 600
Baker County

DATE RECEIVED BY DAS: May 11, 2005

180-DAY DEADLINE: March 26, 2006¹

I. SUMMARY OF CLAIM

The claimants, Ronald and Gail Guyer, seek compensation in the amount of \$230,490 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 9.27-acre property into eight lots for residential development. The property is located at 42218 Pocahontas Road, near Baker City, in Baker 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 Ronald and Gail Guyer's division of the property for residential development: Statewide Planning Goal 14 (Urbanization) and OAR 660-004-0040. These laws will not apply to the claimants only to the extent necessary to allow Ronald and Gail Guyer to use the property as set forth in this report, to the extent that use was permitted at the time they each acquired an interest in the property in 1982 and 1995, respectively. The department acknowledges that the relief to which the claimants are entitled under ORS 197.352 will not allow Gail Guyer and may

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).

not allow Ronald Guyer to use the 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 6, 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, one written comment, evidence or information was received in response to the 10-day notice.²

The comment is relevant to whether the restriction of the claimants' use of the property reduces the fair market value of the property. The comment has 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 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 11, 2005, for processing under OAR 125 division 145. The claim indirectly identifies Baker County's rural residential zone as the law 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 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

Ronald Guyer acquired the subject property from his mother on May 26, 1982, as reflected by a Warranty Deed included with the claim. Gail Guyer acquired an interest in the property from Ronald Guyer on March 22, 1995, as reflected by a Warranty Deed included with the claim. Ronald Guyer’s mother, Grace Brink, initially acquired the property on July 17, 1959, as reflected by a title report included in the claim. A copy of a Baker County tax statement for the period from July 1, 2004, to June 30, 2005, indicates that Ronald and Gail Guyer are the current owners of the subject property.

Conclusions

The claimants, Ronald and Gail Guyer, are “owners” of the subject property as that term is defined by ORS 197.352(11)(C), as of May 26, 1982, and March 22, 1995, respectively. Grace Brink is a “family member” as to Ronald and Gail Guyer, as that term is defined under ORS 197.352(11)(A) and acquired the property on July 17, 1959.

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 states that “Baker County Ordinance # 83-03... limits building sites to five-acre parcels.” In a phone conversation with DLCD on September 8, 2005, Ronald Guyer indicated that the claimants intend to create eight one-acre lots from the subject property and to construct one single-family dwelling on each new lot created.

The property is currently zoned RR-5, which is a rural residential designation under the Baker County Comprehensive Plan in accord with Statewide Planning Goal 14 (Urbanization). The RR-5 zone requires a minimum of five acres for the creation of new lots or parcels (Baker County Zoning Ordinance, #83-03, Sections 303 and 401). The subject property contains 9.27 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 (OA660-004-0040(7)(c)).

The claimants' family acquired the subject property on July 17, 1959, prior to the establishment of the statewide planning goals and their implementing statutes and rules. In 1959, when Grace Brinks acquired it, the property was not zoned by the county.

Conclusions

The zoning requirements, minimum lot size and dwelling standards for rural residential lots or parcels established by OAR 660-004-0040 were enacted after the claimants' family acquired the subject property in 1959, and do not allow division of the property, thereby restricting the use of the property relative to the uses allowed when the property was acquired by the claimants' family in 1959.

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 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 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 claim states that there has been a reduction in the fair market value of the property of \$230,490 as a result of current regulations. This amount is based on an estimated value of \$40,000 per acre for eight building sites, totaling \$320,000, less the current assessed value of \$89,510. The claim includes a current county tax statement for the subject property to document the property’s current value. No appraisal was provided regarding the reduction in the fair market value.

Conclusions

As explained in Section V.(1) of this report, the current owners are Ronald and Gail Guyer, whose family acquired the property in 1959. Thus, under ORS 197.352, the Guyers 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, current land use laws restrict the claimants’ ability to divide the property. The claimants state that the reduction due to these restrictions is \$230,490.

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 subject property relative to uses permitted when the claimants’ family acquired the property in 1959. These regulations include Goal 14 and OAR 660-004-0040. Neither of these regulations was in effect when the claimants’ family acquired the property in 1959 and, therefore, neither is exempt under ORS 197.352(3)(E), which exempts laws in effect when the claimants’ family acquired the property.

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 statutory, goal and rule restrictions on rural residential development apply to the claimants' use of the property, and for the most part these laws are not exempt under ORS 197.352(3)(E).

Laws in effect when the claimants' family 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 create the desired one-acre lots out of the subject property. The claim asserts that laws enforced by the Commission or the department reduce the fair market value of the subject property by \$230,490. However, because the claim does not provide an appraisal or other specific documentation for how the specified restrictions reduce the fair market value of the property, a specific amount of compensation cannot be determined. Nevertheless, 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 Ronald and Gail Guyer to use the subject property for a use permitted at the time they acquired their respective interests in the property on May 26, 1982, and on March 22, 1995.

When Ronald Guyer acquired the property on May 26, 1982, it was zoned A-1 Exclusive Farm Use by Baker County, the purpose of which was to “conserve prime farm land for farm use and to exclude those uses and structure tending seriously to interfere with farm use of the land and accepted farming practices.” However, at that time, the county’s A-1 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 197.251.³ Because the Commission had not acknowledged Baker County’s plan and land use regulations when Ronald Guyer acquired the property in 1982, the statewide planning goals applied directly to the property.⁴ At that time, the State standards for a land division involving property where the local zoning was not acknowledged were that the resulting parcels must be of a size that are “appropriate for the continuation of the existing Commercial Agricultural Enterprise in the area” (Statewide Planning Goal 3).

Thus, the opportunity to divide the property when Ronald Guyer acquired it in 1982, was limited to land divisions done consistent with Goal 3, that required the resulting farm or non-farm parcels to be: (1) “appropriate for the continuation of the existing Commercial Agricultural Enterprise in the area,” and (2) shown to comply with the legislative intent set forth in ORS 215.243. (See endnote¹.) The claim does not establish whether or to what extent Ronald Guyer’s request for one-acre parcels complies with the Goal 3 standard for lot size for farm parcels that applied to the property in 1982.

When Gail Guyer acquired an interest in the property in 1995, the property was zoned RR-5 and was subject to the standards for rural residential lands established under OAR 660 division 4 then in effect. As discussed above, Goal 14 (Urbanization) requires local comprehensive plans to identify and separate urbanizable land from rural land. As interpreted by the courts and the Commission, prior to 2000, when more restrictive rules were adopted, Goal 14 generally prohibited residential development outside of an urban growth boundary where lot or parcel sizes

³ The Commission acknowledged the Baker County Comprehensive Plan and land use regulations as complying with the statewide planning goals on December 14, 1984.

⁴The 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).

are less than 2 acres. The requested division of the property into one-acre parcels exceeds that permitted under Goal 14.

The claim does not establish whether the level of development requested by the claimants would have been permitted under the laws in effect in 1982, when Ronald Guyer initially acquired the property, or in 1995, when Gail Guyer acquired an interest in the property.

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 the claimants' division of the 9.27-acre property: applicable provisions of Statewide Planning Goal 14 and OAR 660-004-0040 enacted after Ronald and Gail Guyer acquired their interest in the property on May 26, 1982, and March 22, 1995, respectively. These land use regulations will not apply to Mr. Guyer's use of the property only to the extent necessary to allow him to use the property for the use described in this report, and only to the extent that use was permitted when he acquired the property on May 26, 1982; and will not apply to Gail Guyer's use of the property only to the extent necessary to allow her to use the property for the use described in this report, and only to the extent that use was permitted when she acquired the property on March 22, 1995. The department acknowledges that the relief to which the claimants are entitled under ORS 197.352 will not allow Gail Guyer and may not allow Ronald Guyer to use the property in the manner set forth in the claim.
2. The action by the State of Oregon provides the state's authorization to Ronald Guyer to use the property for the use described in this report, subject to the standards in effect on May 26, 1982. On that date, the property was subject to applicable provisions of Statewide Planning Goals 3 and 14 and ORS 215 then in effect. The action by the State of Oregon provides the state's authorization to Gail Guyer to use the property for the use described in this report, subject to the standards in effect on March 22, 1995. On that date, the property was subject to applicable provisions of Statewide Planning Goal 14.
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 (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 17, 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.

ⁱ The Goal 3 standard for the review of land divisions or the establishment of a minimum lot size states:

“Such minimum lot sizes as are utilized for any farm use zones shall be appropriate for the continuation of the existing Commercial Agricultural Enterprise within the area.”

On August 20, 1977, the Commission distributed a policy paper explaining the meaning of the Goal 3 minimum lots size standard (see “Common Questions about Goal #3; Agricultural Lands” (August 30, 1977, as revised and added to July 12, 1979). Further interpretation of the Goal 3 minimum lot size standard can be found in *Meeker v Clatsop County*, *Jurgenson v. Union County*, 42 Or App 505 (1979), *Alexanderson v. Polk County*, 289 Or 427, rev. denied, 290 Or 137 (1980) and *Thede v. Polk County*, 3 Or LUBA 336 (1981).

In 1982, the policy paper and court decisions were incorporated into an administrative rule to guide the interpretation and application of the Goal 3 minimum lot size standard (see OAR 660, division 5, specifically rules 15 and 20 effective July 21, 1982).