

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. M118425
(BALLOT MEASURE 37) OF)	
Albert and Janice Higuera, CLAIMANTS)	

Claimants: Albert and Janice Higuera (the Claimants)

Property: Tax lot 1600, Township 4S, Range 1W, Section 19, 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:

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' development of a single-family dwelling on the subject property: applicable provisions of Statewide Planning Goal 3, ORS 215.284 and OAR 660, division 33, enacted after the claimants each acquired their interest in the property. These land use regulations will not apply to Albert Higuera'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 to the extent that use was permitted when he acquired the property on March 23, 1968. These land use regulations will not apply to Janice Higuera'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 to the extent that use was permitted when and she acquired an interest in the property on February 2, 1982.

2. The action by the State of Oregon provides the state's authorization to Albert and Janice Higuera to use the property for the use described in this report, subject to the standards in

effect when they each acquired the property. On February 2, 1982, when Janice Higuera acquired it, the property was subject to Statewide Planning Goal 3 and applicable provisions of ORS 215 then in effect.

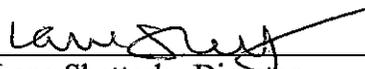
3. To the extent that any law, order, deed, agreement or other legally enforceable public or private requirement provides that the property may not be used without a permit, license, or other form of authorization or consent, the order will not authorize the use of the property unless the claimants first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

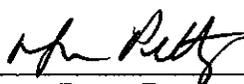
FOR DLCD AND THE LAND CONSERVATION
AND DEVELOPMENT COMMISSION:



Lane Shetterly, Director
DLCD

Dated this 22nd day of March, 2006.

FOR the DEPARTMENT OF ADMINISTRATIVE
SERVICES:



Dugan Petty, Deputy Administrator
DAS, State Services Division
Dated this 22nd 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 183.484: Judicial review under ORS 183.484 may be obtained by filing a petition for review within 60 days from the service of this order. A petition for judicial review under ORS 183.484 may be filed in the Circuit Court for Marion County or the Circuit Court in the county in which you reside.

2. A cause of action under ORS 197.352 (Measure 37 (2004)): If a land use regulation continues to apply to the subject property more than 180 days after the present owner of the property has made written demand for compensation under ORS 197.352¹, the present owner of the property, or any interest therein, shall have a cause of action in the circuit court in which the real property is located.

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

FOR INFORMATION ONLY

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

¹ By order of the Marion County Circuit Court, “all time lines under Measure 37 [were] suspended indefinitely” on October 25, 2005. This suspension was lifted on March 13, 2006 by the court. As a result, a period of 139 days (the number of days the time lines were suspended) has been added to the 180-day time period under ORS 197.352(6) for claims that were pending with the state on October 25, 2005.

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

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

March 22, 2006

STATE CLAIM NUMBER: M118425

NAMES OF CLAIMANTS: Albert and Janice Higuera

MAILING ADDRESS: 20321 Olmstead Road NE
Aurora, Oregon 97002

PROPERTY IDENTIFICATION: Township 4S, Range 1W, Section 19
Tax Lot 1600
Marion County

OTHER CONTACT INFORMATION: David and Carmen Kaufman
960 Southeast Maple Street
Dundee, Oregon 97115

DATE RECEIVED BY DAS: May 13, 2005

180-DAY DEADLINE: March 28, 2006¹

I. SUMMARY OF CLAIM

The claimants, Albert and Janice Higuera, seek compensation in the amount of \$397,000 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 develop a single-family dwelling on their five-acre property. The property is located adjacent to 20321 Olmstead Road NE, near Aurora, 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 Albert and Janice Higuera's development of a single-family dwelling on the subject

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).

property: Statewide Planning Goal 3 (Agricultural Lands), ORS 215.284 and applicable provisions of OAR 660-033-0130. These laws will not apply to the claimants only to the extent necessary to allow Albert and Janice Higuera to use the property for the use described in this report, and to the extent that use was permitted at the time Albert Higuera acquired the property in 1968, and Janice Higuera acquired the property in 1982, respectively. (See the complete recommendation in Section VI. of this report.)

III. COMMENTS ON THE CLAIM

Comments Received

On June 7, 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, two written comments, evidence or information were received in response to the 10-day notice.²

The comments 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. (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 13, 2005 for processing under OAR 125, division 145. The claim identifies Marion County Exclusive Farm Use (EFU) zoning as law that restricts the use of the property as the basis for the claim. Only laws that were enacted prior to

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.

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 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, Albert and Janice Higuera, acquired the subject property on March 23, 1968, and February 2, 1982, respectively, as reflected by deeds included with the claim. A copy of the 2004 Marion County tax statement and confirmation by the Marion County Assessor’s office substantiate that Albert and Janice Higuera are the current owners of the subject property.

Conclusions

The claimants, Albert and Janice Higuera, are “owners” of the subject property as that term is defined by ORS 197.352(11)(C), as of March 23, 1968, as to Albert Higuera, and February 2, 1982, as to Janice Higuera. Albert Higuera is a “family member” as to Janice Higuera as that term is defined by ORS 197.352(11)(C).

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 the property is zoned EFU and “this zoning doesn’t allow a home to be built on it. It only allows the property to be farmed.”

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 Statewide Planning Goal 3 (Agricultural Lands), in accord with OAR 660,

division 33, and ORS 215 because the claimants' property is "agricultural land" as defined by Goal 3.³ Goal 3 became effective on January 25, 1975, and required that agricultural lands as defined by the Goal be zoned EFU pursuant to ORS 215.

Current land use regulations, particularly ORS 215.263, 215.284, 215.780 and OAR 660, division 33, as applied by Goal 3, 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.

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.)

The claimant, Albert Higuera, acquired the subject property on March 23, 1968, prior to the adoption of the statewide planning goals and implementing statutes and regulations. At that time the property was not zoned by Marion County.

Conclusions

The zoning requirements and dwelling standards established by Statewide Planning Goal 3 (Agricultural Lands) and provisions applicable to land zoned EFU in ORS 215 and OAR 660, division 33, were all enacted after Albert Higuera acquired the subject property in March 1968 and do not allow a single-family dwelling on the property, thereby restricting the use of the property relative to the uses allowed when the property was acquired by Albert Higuera in 1968. In 1968, the property was not subject to any County zoning.

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 use 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 The claimants' property is "agricultural land" because it contains NRCS (Natural Resources Conservation Service) Capability Classes II (70%) (prime) and III (30%)(farmland of statewide importance) soils.

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 includes an estimate of \$397,000 as the reduction in the property’s fair market value, due to current regulations. This estimate is based on several values of comparable properties with dwellings on them.

Conclusions

As explained in Section V.(1) of this report, the current owners are Albert and Janice Higuera who acquired the property on March 13, 1968, and February 2, 1982, respectively. Under ORS 197.352, Albert and Janice Higuera 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 their ability to build a single-family dwelling on the property. The claimants estimate the reduction in value due to the restrictions to be \$397,000.

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 regulation 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 1968, when Albert Higuera acquired the property. These provisions include Statewide Planning Goal 3 (Agricultural Lands) and applicable provisions of ORS 215 and OAR 660, division 33, which Marion County has implemented through its EFU zone. None of these regulations are exempt under ORS 197.352(3)(E), which exempts laws in effect when the claimant or claimant’s 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 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).

Laws in effect when Albert Higuera 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 use 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 develop a single-family dwelling on the subject property. The claim asserts the laws enforced by the Commission or department reduce the fair market value of the subject property by \$397,000. 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 Albert Higuera to use the subject property for a use permitted at the time he acquired the property March 23, 1968, and to allow Janice Higuera to use the subject property for a use permitted at the time she acquired the property on February 2, 1982.

Janice Higuera, acquired an interest in the property on February 2, 1982. At that time, the property was zoned EFU by Marion County. However, the County's comprehensive plan and land use regulations had not been acknowledged by the Commission for compliance with the Statewide Planning pursuant to ORS 197.250 and 197.251. Since the Commission had not acknowledged Marion County's comprehensive plan and land use regulations when Janice Higuera acquired the property on February 2, 1982, Statewide Planning Goal 3 applied directly to the property on the date of her acquisition.⁴

Goal 3 allowed farm dwellings if determined to be "customarily provided in conjunction with farm use" under ORS 215.213(1)(e). Before a farm dwelling could be established on Agricultural Land, the farm use to which the dwelling relates must "be existing."⁵ Further, approval of a farm dwelling required that the dwelling be situated on a parcel wholly devoted to farm use and if on an existing parcel, the dwelling had to be on a parcel appropriate for the continuation of the existing commercial agricultural enterprise within the area.⁶ ORS 215.213(3) authorized a non-farm dwelling only where the dwelling was compatible with farm uses, consistent with the intent of ORS 215.243, did not interfere seriously with accepted farming practices on adjacent lands, did not materially alter the stability of the land use pattern in the area, and was situated on land generally unsuitable for production of farm crops and livestock.⁷

No information has been provided establishing whether the development of a dwelling on the subject property complies with either the applicable standards for dwellings under Goal 3 or ORS 215.213 in effect at the time Janice Higuera acquired the property in 1982.

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' development of a single-family dwelling on the subject property:

⁴ Statewide Planning Goal 3 became effective on January 25, 1975, and was applicable to legislative land use decisions and some quasi-judicial land use decisions where site specific goal provisions applied prior to the Commission's acknowledgment of the County's Goal 3 program on May 20, 1982 (*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 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).

⁵ *Newcomer v. Clackamas County*, 92 Or App 174, *modified* 94 Or App 33 (1988) and *Matteo v. Polk County*, 11 Or LUBA 259, 263 (1984), *affirmed without opinion* 70 Or App 179 (1984).

⁶ OAR 660-05-025.

⁷ When determining whether land is "generally unsuitable for the production of farm crops and livestock" under ORS 215.213(3), the entire parcel or tract must be evaluated rather than a portion thereof. *Smith v. Clackamas County*, 313 Or 519 (1992).

applicable provisions of Statewide Planning Goal 3, ORS 215.284 and OAR 660, division 33, enacted after the claimants each acquired their interest in the property. These land use regulations will not apply to Albert Higuera'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 to the extent that use was permitted when he acquired the property on March 23, 1968. These land use regulations will not apply to Janice Higuera's use of the property only to the extent necessary to allow her to use the property of the use described in this report, and to the extent that use was permitted when and she acquired an interest in the property on February 2, 1982.

2. The action by the State of Oregon provides the state's authorization to Albert and Janice Higuera to use the property for the use described in this report, subject to the standards in effect when they each acquired the property. On February 2, 1982, when Janice Higuera acquired it, the property was subject to Statewide Planning Goal 3 and 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 (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 19, 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.