

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. M118454
(BALLOT MEASURE 37) OF)	
Joel and Carolyn Neuschwander, CLAIMANTS)	

Claimants: Joel and Carolyn Neuschwander (the Claimants)

Property: Tax Lot 100, Township 4S, Range 1E, Section 31C; and Tax Lot 400, Township 4S, Range 1E, Section 31, Clackamas County (the Property)

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

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

ORDER

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

1. In lieu of compensation under ORS 197.352, the State of Oregon will not apply the following laws to Joel and Carolyn Neuschwanders' division of the 106.26-acre property into approximately five-acre parcels or to the establishment of a single-family dwelling on each parcel created: applicable provisions of Statewide Planning Goal 3, ORS 215, and OAR 660, division 33, enacted after December 18, 1974. These land use regulations will not apply to Joel and Carolyn Neuschwanders' use of their property only to the extent necessary to allow the claimants to use the property for the use described in this report, and only to the extent that use was permitted when they acquired the property on December 18, 1974.

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 December 18, 1974. On that date, the property was subject to applicable provisions of the Interim Goals (ORS 215.515, 1973 edition) as required under ORS 197.175(1) and 197.280 (1973 edition).

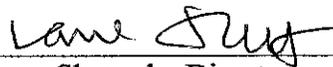
3. To the extent that any law, order, deed, agreement or other legally enforceable public or private requirement provides that the property may not be used without a permit, license, or other form of authorization or consent, the order will not authorize the use of the property unless the claimants first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

4. Any use of the property by the 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.

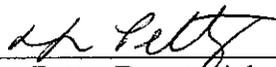
FOR DLCD AND THE LAND CONSERVATION
AND DEVELOPMENT COMMISSION:



Lane Shetterly, Director
DLCD

Dated this 27th day of March, 2006.

FOR the DEPARTMENT OF ADMINISTRATIVE
SERVICES:



Dugan Petty, Deputy Administrator
DAS, State Services Division

Dated this 27th 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 27, 2006

STATE CLAIM NUMBER: M118454

NAMES OF CLAIMANTS: Joel and Carolyn Neuschwander

MAILING ADDRESS: 6097 South Whiskey Hill Road
Hubbard, Oregon 97032

PROPERTY IDENTIFICATION: Township 4S, Range 1E, Section 31C
Tax Lot 100; and
Township 4S, Range 1E, Section 31
Tax Lot 400
Clackamas County

DATE RECEIVED BY DAS: May 18, 2005

180-DAY DEADLINE: April 2, 2006¹

I. SUMMARY OF CLAIM

The claimants, Joel and Carolyn Neuschwander, seek compensation in the amount of \$2,820,000 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 106.26-acre property into approximately five-acre parcels and to develop a residential dwelling on each parcel. The property is located at 6097 South Whiskey Hill Road, near Hubbard, in Clackamas County. (See claim.)

II. SUMMARY OF STAFF RECOMMENDATION

Based on the findings and conclusions set forth below, the Department of Land Conservation and Development (the department) has determined that this claim is valid. Department staff recommends 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 Joel and Carolyn Neuschwander's division of the property into approximately five-acre parcels for residential development: applicable provisions of Statewide Planning Goal 3 (Agricultural Lands), ORS 215, and OAR 660 division 33. These laws will not apply to the

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).

claimants only to the extent necessary to allow Joel and Carolyn Neuschwander to use the property for the use described in this report, to the extent that use was permitted at the time they acquired the property in 1974. (See the complete recommendation in Section VI. of this report.)

III. COMMENTS ON THE CLAIM

Comments Received

On June 28, 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 was received in response to the 10-day notice.²

The comment 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 the 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 18, 2005, for processing under OAR 125, division 145. The claim identifies Statewide Planning Goal 3 (Agricultural Lands) as a 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

The claimants, Joel and Carolyn Neuschwander, acquired the subject property on December 18, 1974, as reflected by a Warranty Deed included with the claim. The property was transferred to the Neuschwander Living Trust, a joint revocable living trust, on February 14, 1994. Transfer to a revocable trust does not constitute a change in ownership for purposes of ORS 197.352. A copy of a Clackamas County tax statement dated June 30, 2003, indicates that Joel Neuschwander, Trustee of the Neuschwander Living Trust, is the owner of the subject property. (See the department’s claim file.)

Conclusions

The claimants, Joel and Carolyn Neuschwander, are “owners” of the subject property, as that term is defined by ORS 197.352(11)(C), as of December 18, 1974.

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 claim states that “The property is zoned EFU and prohibits land divisions for farm use in EFU zones if not more than a minimum acreage.”³

³ The claim states that the intent is to divide the property for farm use and not for residential development.

The claim is based, generally, on Clackamas 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 ORS 215 and OAR 660, division 33, because the claimants' property is "agricultural land" as defined by Goal 3.⁴ 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 of 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 established 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.)

The claimants acquired the subject property on December 18, 1974. At that time the property was not zoned by Clackamas County. The first zoning was applied in 1976, according to the County staff report for a County ORS 197.352 claim for this property filed by the claimants. The claimants acquired the property after the adoption of SB 100 (Chapter 80, Oregon Laws 1973, effective October 5, 1973) but before the adoption of the statewide planning goals effective January 25, 1975.

During the period between October 5, 1973 when SB 100 became effective, and January 25, 1975, when the statewide planning goals became effective, ORS 197.175(1) and 197.280 (1973 edition) required, in addition to any local plan or zoning provisions, that cities and counties exercise their planning responsibilities (including implementation of their comprehensive plan) in accordance with the "interim" land use goals set forth in ORS 215.515 (1973 edition).⁵

⁴ According to the USDA Soil Survey of Clackamas County, Oregon, the soils are predominantly agriculture soils of Class I, IIw, and IVw, prime agriculture land in the Willamette Valley.

⁵ *Petersen v. Klamath Falls*, 279 Or 249 (1977). See also: *Meeker v. Board of Comm'rs*, 287 Or 665 (1979) (review of a subdivision is an exercise of planning responsibilities requiring application of the goals); *State Housing Council v. Lake Oswego*, 48 Ore. App. 525 (1981) ("Land use planning responsibility is not defined in ORS 197. The

The use proposed here is to divide the land. As a result, if the claimants had sought to create that use in 1974, as a matter of law the use would have been subject to the interim planning goals at ORS 215.515. (See endnote¹.) One of the interim goals was to “conserve prime farm lands for the production of crops...” Soil types are a determinant of prime farm land. The subject 106.26-acre property is predominantly composed of soils rated as “prime” by the Natural Resource Conservation Service (NRCS).

No information has been provided showing whether or to what extent the approval of five-acre parcels for residential use complies with the interim planning goals set forth in ORS 215.515 (1973 edition). In particular, it is not apparent how the division and development of 106.26 acres of predominantly “prime” farmland would “conserve prime farm lands for the production of crops” as required by the interim goals at the time the claimants acquired the property in 1974.

Conclusions

Minimum lot size standards established by Statewide Planning Goal 3 (Agricultural Lands), amendments to ORS 215 and OAR 660, division 33 were all adopted since Joel and Carolyn Neuschwander acquired the property in 1974, and do not allow the division of the property into parcels less than 80 acres in size as may have been possible in 1974. However, the claim does not establish whether or to what extent the claimant’s requested division of the 106.26-acre property into approximately five-acre parcels could comply with the standards in effect when the claimants acquired the property in 1974.

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 includes an informal estimate of \$2,820,000 as the reduction in the property’s fair market value due to current regulations. This amount is based on a broker’s estimate of the market value of approximately five-acre parcels in the area.

Supreme Court has interpreted that term as including annexation approvals, subdivision approvals and partition approvals.” (emphasis added)).

Conclusions

As explained in Section V.(1) of this report, the current owners are Joel and Carolyn Neuschwander, who acquired the property on December 18, 1974. Under ORS 197.352, Joel and Carolyn Neuschwander are due compensation for land use regulations that restrict the use of the subject property in a manner that reduces its fair market value. Without an appraisal or other substantiating documentation, and whether verification of whether the requested use would have been permitted when the claimants acquired the property in 1974, it is not possible to substantiate the claimants' estimate of the property's reduction in value due to current regulations. However, based on the findings and conclusions in Section V.(2) of this report, it is possible that laws adopted since the claimants acquired the property may have reduced the value of the property to some extent.

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 state land use regulations that may restrict the use of the property relative to what may have been allowed in 1974, when the claimants acquired the property. These provisions include Statewide Planning Goal 3 (Agricultural Lands), and applicable provisions of ORS 215 and OAR 660, division 33, which Clackamas County has implemented through its EFU zone. These laws are not exempt under ORS 197.352(3)(E) to the extent they were enacted or adopted after the claimants acquired the property in 1974. Provisions of ORS 215, including the provisions that implemented the Interim Planning Goals in effect in 1974, are exempt under ORS 197.352(3)(E), which exempts laws in effect at the time the claimants 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 land divisions and use of farm land apply to the claimants' use of the property, and these laws are not exempt under ORS 197.352(3)(E) to the extent they were enacted or adopted after the claimants acquired the property in 1974. Provisions of ORS 215 in effect when the claimants acquired the property in 1974, 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 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 for residential development. The claim asserts that the laws enforced by the Commission or department reduce the fair market value of the subject property by \$2,820,000. 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, and without verification of whether or to what extent the requested use would have been permitted in 1974, a specific amount of compensation cannot be determined. Nevertheless, based on the record for this claim, the department acknowledges that it is possible that the laws on which the claim is based may 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 Joel and Carolyn Neuschwander to use the subject property for a use permitted at the time they acquired the property in 1974.

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 Joel and Carolyn Neuschwanders' division of the 106.26-acre property into approximately five-acre parcels or to the establishment of a single-family dwelling on each parcel created: applicable provisions of Statewide Planning Goal 3, ORS 215, and OAR 660, division 33, enacted after December 18, 1974. These land use regulations will not apply to Joel and Carolyn Neuschwanders' use of their property only to the extent necessary to allow the claimants to use the property for the use described in this report, and only to the extent that use was permitted when they acquired the property on December 18, 1974.

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 December 18, 1974. On that date, the property was subject to applicable provisions of the Interim Goals (ORS 215.515, 1973 edition) as required under ORS 197.175(1) and 197.280 (1973 edition).

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 obtains that permit, license or other form of authorization or consent. Such requirements may include, but are not limited to: a building permit, a land use decision, a permit as defined in ORS 215.402 or ORS 227.160, other permits or authorizations from local, state or federal agencies, and restrictions on the use of the property imposed by private parties.

4. Any use of the property by the 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 24, 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 "interim" land use goals are set forth in ORS 215.515(a) to (j) as follows: (a) "To preserve the quality of the air, water and land resources of the state," (b) "To conserve open space and protect natural and scenic resources," (c) "To provide for the recreational needs of citizens of the state and visitors," (d) "To conserve prime farm lands for the production of crops," (e) "To provide for the orderly and efficient transition from rural to urban land use," (f) "To protect life and property in areas subject to floods, landslides and other natural disasters," (g) "To provide and encourage a safe, convenient and economic transportation system including all modes of transportation: Air, water, rail, highway and mass transit and recognizing differences in the social costs in the various modes of transportation," (h) "To develop a timely, orderly and efficient arrangement of public facilities and services to serve as a framework for urban and rural development," (i) "To diversify and improve the economy of the state," and (j) "To ensure that development of properties within the state is commensurate with the character and the physical limitations of the land." (ORS 215.515, 1973 edition).