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. M118504
(BALLOT MEASURE 37) OF	)	
Kenneth and Joan Carneiro, CLAIMANTS	)	

Claimants: Kenneth and Joan Carneiro (the Claimants)

Property: Tax lots 201, 301, 303, 304, 391, 393, 394, Township 2S, Range 3E, Section 19, 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 the Kenneth and Joan Carneiro's division of the 30.28-acre property into six, approximately 5-acre parcels for residential development: applicable provisions of Goal 14 and OAR 660, division 4, adopted after March 4, 1977. These land use regulations will not apply to the Carneiros only to the extent necessary to allow them to use the subject property for the use described in this report, and only to the extent that use was permitted when they acquired the property on March 4, 1977.

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 4, 1977. On that date, the property was subject to applicable provisions of 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 subject 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 227.160, other permits or authorizations from local, state or federal agencies and restrictions on the use of the subject property imposed by private parties.

4. Any use of the subject 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 subject 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 subject 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 3rd day of April, 2006.

FOR the DEPARTMENT OF ADMINISTRATIVE SERVICES:

Dugan Petty, Deputy Administrator
DAS, State Services Division
Dated this 3rd day of April, 2006.

NOTICE OF RIGHT TO APPEAL OR OTHER JUDICIAL RELIEF

You are entitled, or may be entitled, to judicial remedies including the following:

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 197.352[1], 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."

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[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

April 3, 2006

STATE CLAIM NUMBER:	M118504
NAMES OF CLAIMANTS:	Kenneth and Joan Carneiro
MAILING ADDRESS:	15216 South Springwater Road Oregon City, Oregon 97045
IDENTIFICATION OF PROPERTY:	Township 2S, Range 3E, Section 19 Tax lots 201, 301, 303, 304, 391, 393, 394 Clackamas County
OTHER CONTACT INFORMATION:	Arthur Stangell 707 Main Street, Suite 210 Oregon City, Oregon 97045
DATE RECEIVED BY DAS:	May 24, 2005
180-DAY DEADLINE:	April 8, 2006[1]

I. SUMMARY OF CLAIM

The claimants, Kenneth and Joan Carneiro, seek compensation in the amount of $1.1 million for a reduction in fair market value as a result of land use regulations that are alleged to restrict the use of certain private real property. The claimants desire compensation or the right to divide their 30.28-acre property into six, approximately 5-acre parcels, one of which is developed with an existing dwelling. The subject property is located at 15216 South Springwater Road, near Oregon City, 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 the claim is valid. Department staff recommends that, in lieu of compensation, the requirements of the following state laws enforced by the Land Conservation and Development Commission (the Commission) or the department not apply to the claimants' division of 30.28-acre property into six, approximately 5-acre parcels

[1] This date reflects 180 days from the date the claim was submitted as extended by the 139 days enforcement of Ballot 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).

for residential development: Statewide Planning Goal 14 (Urbanization) and Oregon Administrative Rules (OAR) 660-004-0040, adopted after March 4, 1977. These land use regulations will not apply to the claimants only to the extent necessary to allow them to use the subject property for the use described in this report, and only to the extent that use was permitted when they acquired the property on March 4, 1977. (See the complete recommendation in Section VI of this report.)

III. COMMENTS RECEIVED

On August 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, two written comments, evidence or information were received in response to the 10-day notice, one expressing support for the claim, and one relevant to whether the restriction of the claimants' use of the subject property reduces the fair market value of the property. The comments have been considered by the department in preparing this report.

IV. TIMELINESS OF CLAIM

Requirement

ORS 197.352(5) (Ballot Measure 37, Section 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 Ballot 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 Ballot 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 criterion, whichever is later.

Findings of Fact

This claim was submitted to DAS on May 24, 2005, for processing under OAR 125, division 145. The claim identifies OAR 660-004-0040(8)(e) as the basis for the claim. Only laws that were enacted or adopted prior to December 2, 2004, are the basis for this claim.

Conclusions

The claim has been submitted within two years of the effective date of Ballot Measure 37 (December 2, 2004), based on land use regulations enacted or 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 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

Kenneth and Joan Carneiro acquired the subject property on March 4, 1977, as evidenced by a fulfillment warranty deed, dated January 24, 1979, which was submitted with the claim and references a March 4, 1977, contract by which the claimants acquired the property. A title report dated April 19, 2005, indicates that Kenneth and Joan Carneiro are the current owners of the subject property.

Conclusions

The claimants, Kenneth and Joan Carneiro, are "owners" of the subject property as that term is defined by ORS 197.352(11)(C), as of March 4, 1977.

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 indicates that the claimants desire to divide the subject property into six parcels, and that OAR 660-004-0040(8)(e) reduced the development potential of the claimants' 30-acre property from six parcels to one.

The claim is based generally on Clackamas County's Rural Residential Farm Forest, five-acre minimum (RRFF-5) zone, and the applicable provisions of state law that require such zoning. The claimants' RRFF-5 zone is a zoned rural residential as required by Goal 14, which generally requires that land outside of Urban Growth Boundaries (UGBs) be used for rural uses.

Goal 14 was effective on January 25, 1975, and requires that local comprehensive plans identify and separate urbanizable land from rural land in order to provide for an orderly and efficient transition from rural to urban land use. In 2000, as a result of a 1986 Oregon Supreme Court decision,[2] the Commission amended Goal 14 and adopted OAR 660-004-0040 (Application of Goal 14 to Rural Residential Areas), which was effective on October 4, 2000. The rule

[2] *1000 Friends of Oregon v. LCDC (Curry County),* 301 Or 447 (1986).

establishes minimum acreage standards for approval of new lots or parcels in rural residential zones, depending on the location and the local rural residential designation of the property at issue. For rural residential properties less than one mile of the UGB for the Portland metropolitan area, the rule states that the minimum area for any new lot or parcel shall be 20 acres (OAR 660-004-0040(8)(e)).[3] The subject property is located within one-mile of the UGB for the Portland metropolitan area and therefore is subject to the 20-acre minimum lot size standard under OAR 600-004-0040(8)(e).

When the claimants acquired the subject property in 1977, it was zoned R-30 by Clackamas County, which established a one-acre minimum parcel size for the creation of new lots or parcels. However, the claimants acquired the subject property after the adoption of the statewide planning goals, but before the Commission acknowledged Clackamas County's land use regulations to be in compliance with statewide planning goals pursuant to ORS 197.250 and 197.251. Because the Commission had not acknowledged Clackamas County's plan and land use regulations when the claimants acquired the subject property in 1977, the statewide planning goals, including Goal 14, applied directly to the claimants' property when they acquired it.[4]

Conclusions

The minimum lot size requirements for rural residential lots or parcels established by Goal 14 and OAR 660-004-0040 were adopted after the claimants acquired the subject property in 1977 and do not allow the desired division of the property. In particular, because the subject property is located within one mile of the Portland metropolitan area UGB, the 30.28-acre property cannot be divided as desired by the claimants without a Goal 14 exception.

When the claimants acquired the subject property in 1977, the statewide planning goals, and in particular the general requirements of Goal 14, applied directly to the property. As interpreted by the Commission (OAR 660-040-0040), Goal 14 generally required a minimum lot size of at least two acres. The claim does not establish whether or to what extent the claimants' desired level of development would have been permitted under the laws in effect in 1977 when the claimants acquired the subject property.

This report addresses only those state laws that are identified in the claim, or that the department is certain apply to the subject property based on the uses that the claimants have identified.

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[3] The Portland metropolitan service area does not have an urban reserve area acknowledged to comply with OAR 660, division 21. Therefore, the provisions of OAR 660-004-0040(d), exempting lots or parcels from the 20-acre standard, do not apply.

[4] 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 each county's land use regulations. *Perkins v. City of Rajneeshpuram*, 300 Or 1 (1985); *Alexanderson v. Polk County*, 289 Or 427, *rev den*, 290 Or 137 (1980); *Sunnyside Neighborhood Assn. v. Clackamas County*, 280 Or 569 (1977); *Jurgenson v. Union County*, 42 Or App 505 (1979); and *1000 Friends of Oregon v. Benton County*, 32 Or App 413 (1978). After the county's plan and land use regulations were acknowledged by the 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, the local provisions must be interpreted consistent with the substance of the goals and implementing rules. *Foster v. Polk County*, 115 Or App 475 (1992); *Kenagy v. Benton County*, 115 Or App 131 (1992).

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 which 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 includes an estimate of $1.1 million as the reduction in the subject property's fair market value due to current regulations. This amount is based on an estimate of an area realtor.

Conclusions

As explained in Section V.(1) of this report, the claimants, Kenneth and Joan Carneiro, have been owners of the subject since March 4, 1977. Thus, under ORS 197.352, the claimants are due compensation for land use regulations that restrict the use of the subject property in a manner than reduces its fair market value. Based on the findings and conclusions in Section V.(2) of this report, laws adopted since Kenneth and Joan Carneiro acquired the subject property in 1977 restrict the desired division of the property. The claim asserts the reduction in value due to the restriction to be $1.1 million.

Without an appraisal or other substantiating documentation, and without verification of whether or the extent to which the claimants' desired use of the subject property was allowed under the standards in effect when they acquired the property, 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 the fair market value of the subject has been reduced to some extent as a result of land use regulations enforced by the Commission or the department.

4. Exemptions Under ORS 197.352(3)

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

Findings of Fact

The claim is based on state land use regulations that restrict the use of the subject property, including Goal 14 and OAR 660-004-0040. With the exception of provisions of Goal 14 in effect in 1977, these land use regulations were adopted after the claimants acquired the subject property.

Conclusions

Without a specific development proposal for the property, it is not possible for the department to determine which laws may apply to a particular use of the property, or whether those laws may fall under one or more of the exemptions under ORS 197.352. It appears that the general statutory, goal and rule restrictions on division of the subject property are not exempt under ORS 197.352(3)(E) to the extent they were adopted after the claimants acquired the subject property on March 4, 1977. Provisions of Goal 14 in effect when the claimants acquired the subject property in 1977 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 subject 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 subject property that have not been identified in the claim. In some cases, it will not be possible to know which 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. 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 subject 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. 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 subject 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 to allow the present owners to carry out a use of the property permitted at the time the present owners acquired the property. The Commission, by rule, has directed that if the department determines a claim is valid, the Director of the department 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 in this report, laws enforced by the Commission or the department, restrict the claimants' ability to divide the 30.28-acre parcel into six, approximately 5-acre parcels for residential use. The claim asserts the laws enforced by the Commission or department reduce the fair market value of the subject property by $1.1 million. However, because the claim does not provide an appraisal or other specific documentation establishing how the specified restrictions reduce the fair market value of the subject property, and without

verification of whether or the extent to which the claimants' desired use of the property was allowed under the standards in effect when they acquired the property, a specific amount of compensation cannot be determined. Nevertheless, based on the record for this claim, the department acknowledges that laws on which the claim is based likely have reduced the fair market value of the subject property to some extent.

No funds have been appropriated at this time for the payment of claims. In lieu of payment of just compensation, ORS 197.352 authorizes the department to modify, remove or not apply all or parts of certain state land use regulations to allow Kenneth and Joan Carneiro to use the subject property for a use permitted at the time they acquired the property on March 4, 1977.

Conclusions

Based on the current 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 Kenneth and Joan Carneiro's division of the 30.28-acre property into six, approximately 5-acre parcels for residential development: applicable provisions of Goal 14 and OAR 660, division 4, adopted after March 4, 1977. These land use regulations will not apply to the Carneiros only to the extent necessary to allow them to use the subject property for the use described in this report, and only to the extent that use was permitted when they acquired the property on March 4, 1977.

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 4, 1977. On that date, the property was subject to applicable provisions of 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 subject 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 227.160, other permits or authorizations from local, state or federal agencies and restrictions on the use of the subject property imposed by private parties.

4. Any use of the subject 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 subject 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 subject property by the claimants.

VII. COMMENTS ON THE DRAFT STAFF REPORT

The department issued its draft staff report on this claim on March 13, 2006. 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.