

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. M11701
(BALLOT MEASURE 37) OF	)	
Kenneth Nanson, Betty Nanson,	)	
Jerry Rensch, and Kathleen Rensch, CLAIMANTS	)	

Claimants: Kenneth Nanson, Betty Nanson, Jerry Rensch, and Kathleen Rensch  
(the Claimants)

Property: Township 3S, Range 1E, Section 18 and 19, Tax lot 2900. 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), the Oregon Department of Transportation (the ODOT Report), and the Department of State Lands (the DSL Report) attached to and by this reference incorporated into this order.

ORDER

The Claim is denied as to laws administered by the Oregon Department of Transportation or the Oregon Transportation Commission for the reasons set forth in the ODOT Report

The Claim is denied as to laws administered by the Oregon Department of State Lands for the reasons set forth in the DSL Report

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 Kenneth and Betty Nanson and Jerry and Kathleen Rensch's division of the "non-prime farm land" portion of the subject property into 1-acre parcels or to their development of a dwelling on each parcel: applicable provisions of Goals 3 and 14, ORS 215 and OAR 660, division 33, enacted or adopted after November 29, 1974. 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 November 29, 1974.

2. The action by the State of Oregon provides the state's authorization to the claimants to use the non-prime farm land of the subject property for the use described in this report, subject to the standards in effect on November 29, 1974. On that date, the property was subject to the applicable provisions of ORS 215 then in effect, including the interim planning goals set forth in ORS 215.515 (1973 edition).

3. To the extent that any law, order, deed, agreement or other legally enforceable public or private requirement provides that the non-prime portion of 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 non-prime portion 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).

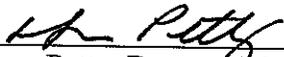
5. Without limiting the generality of the foregoing terms and conditions, in order for the claimants to use the non-prime portion of subject property, it may be necessary for them to obtain a decision under ORS 197.352 from a city and/or county and/or metropolitan service district that enforces land 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, by the Oregon Department of Transportation under ORS 197.352, OAR 125, division 145, and the Assistant Director for the Department of State Lands under ORS 197.352, OAR 125, division 145.

FOR DLCD AND THE LAND  
CONSERVATION AND  
DEVELOPMENT COMMISSION:

  
Lane Shetterly, Director  
DLCD  
Dated this 16<sup>th</sup> day of May, 2006.

FOR THE DEPARTMENT OF  
ADMINISTRATIVE SERVICES:

  
Dugan Petty, Deputy Administrator  
DAS, State Services Division  
Dated this 16<sup>th</sup> day of May, 2006.

FOR THE DEPARTMENT OF  
TRANSPORTATION:  
Matthew L. Garrett, Director

  
By: Dennis B. Wiegand  
Interim State Right of Way Manager  
Oregon Department of Transportation  
Dated this 16<sup>th</sup> day of May, 2006

FOR THE DEPARTMENT OF STATE  
LANDS  
Ann Hanus, Director

  
By: Jeannette Holman, Assistant Director  
Oregon Department of State Lands  
Dated this 16<sup>th</sup> day of May, 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 197.352<sup>1</sup>, 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)

<sup>1</sup> 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.

**ORS 197.352 (BALLOT MEASURE 37) CLAIM FOR COMPENSATION**  
**OREGON DEPARTMENT OF LAND CONSERVATION AND DEVELOPMENT**  
**Final Staff Report and Recommendation**

May 16, 2006

**STATE CLAIM NUMBER:** M118701

**NAMES OF CLAIMANTS:** Kenneth Nanson  
Betty Nanson  
Jerry Rensch  
Kathleen Rensch

**MAILING ADDRESS:** 14165 Northwest Linmere Lane  
Portland, Oregon 97229

8370 Southwest Apple Way, J102  
Portland, Oregon 97225

2316 Southwest 15th Avenue  
Portland, Oregon 97201

**PROPERTY IDENTIFICATION:** Township 3S, Range 1E, Section 18 and 19  
Tax lot 2900  
Clackamas County

**OTHER CONTACT INFORMATION:** Joseph T. Hagen  
Hagen O'Connell, LLP  
121 Southwest Morrison, Suite 1500  
Portland, Oregon 97204

**DATE RECEIVED BY DAS:** July 1, 2005

**180-DAY DEADLINE:** May 16, 2006<sup>1</sup>

**I. SUMMARY OF CLAIM**

The claimants, Kenneth and Betty Nanson and Jerry and Kathleen Rensch, seek compensation in the amount of \$9,611,890 for the 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 the 67.91-acre property into 1-acre parcels and to develop a

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<sup>1</sup> This date reflects 180 days from the date the claim was submitted, as extended by the 139 days that all timelines under Measure 37 were suspended during the pendency of *MacPherson v. Dept. of Admin. Svcs.*, 340 Or 117 (2006).

dwelling on each parcel. The subject property is located at 29701 Southwest 60th Avenue, near Wilsonville, 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 for the "non-prime farm land" portion of the subject property. 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 Kenneth and Betty Nanson and Jerry and Kathleen Rensch's partition of the "non prime farm land" portion of the subject property into 1-acre parcels and to their development of a dwelling on each parcel: applicable provisions of Statewide Planning Goal 3 (Agricultural Lands), ORS 215 and Oregon Administrative Rules (OAR) 660, division 33, enacted or adopted after November 29, 1974. These laws 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 November 29, 1974.

Based on the preliminary findings and conclusions set forth below, the department has determined that the claim is not valid for the "prime farm land" portion of the subject property because neither the Commission nor the department has enforced laws that restrict the claimants' use of private real property relative to uses permitted at the time they acquired the subject property on November 29, 1974. (See the complete recommendation in Section VI. of this report.)

## III. COMMENTS ON THE CLAIM

### Comments Received

On July 22, 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.

The comment does not address whether the claim meets the criteria for relief under ORS 197.352. Comments concerning the effects a use of the subject property may have on surrounding areas are generally 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 waive 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 Measure 37 (December 2, 2004), within two years of that effective date, or the date the public entity applies the land use regulation as an approval criteria to an application submitted by the owner, whichever is later; or
2. For claims arising from land use regulations enacted after the effective date of Measure 37 (December 2, 2004), within two years of the enactment of the land use regulation, or the date the owner of the property submits a land use application in which the land use regulation is an approval criteria, whichever is later.

### **Findings of Fact**

This claim was submitted to DAS on July 1, 2005, for processing under OAR 125, division 145. The claim identifies the Clackamas County Comprehensive Plan adopted in 1974, provisions of Clackamas County Zoning and Development Ordinances, Goal 3 and 11 (Public Facilities and Services), provisions of ORS 92, 196, 197, 215 and 377 and provisions of OAR 141 and 660 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 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 or relief from specific laws for "owners" as that term is defined in the statute. ORS 197.352(11)(C) defines "owner" as "the present owner of the property, or any interest therein."

### **Findings of Fact**

On November 29, 1974, Kenneth Nanson acquired a one-half interest in the subject property with his then wife Betty Nanson as tenants in entirety, and Jerry and Kathleen Rensch acquired a one-half interest in the property as tenants in entirety, as reflected by a contract of sale included with the claim. In 1982, Kenneth and Betty Nanson were divorced and their interest was converted from tenants in entirety to tenants in common. The contract of sale was fulfilled on September 19, 1989, as reflected by a warranty deed included with the claim. The Clackamas County Assessor's Office confirms that the claimants are the current owners of the subject property.

## **Conclusions**

The claimants, Kenneth and Betty Nanson and Jerry and Kathleen Rensch, are “owners” of the subject property as that term is defined by ORS 197.352(11)(C) as of November 29, 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 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 the claimants’ desire to divide the 67.91-acre property into 1-acre parcels and to develop a dwelling on each parcel. The claim identifies the Clackamas County Comprehensive Plan adopted in 1974, provisions of Clackamas County Zoning and Development Ordinances, Goal 3 and 11, provisions of ORS 92, 196, 197, 215 and 377 and provisions of OAR 660 as restricting the division and development of the property.<sup>2</sup>

The claimants do not identify how Goal 11 restricts their desired use of the property, and it is not clear to the department that it does. With the exception of laws discussed below, in the absence of any explanation by the claimants as to how these regulations restrict the desired use of the property, this report does not address these regulations.

The claim is based generally on Clackamas County’s current Exclusive Farm Use (EFU) District zone and the applicable provisions of state law that require such zoning. The claimants’ property is zoned EFU as required by Goal 3 in accordance with ORS 215 and OAR 660, division 33, because the claimants’ property is “agricultural land” as defined by Goal 3.<sup>3</sup> Goal 3 became effective on January 25, 1975, and required that agricultural land as defined by the Goal be zoned EFU pursuant to ORS 215.

Current land use regulations, particularly ORS 215.263, 215.284 and 215.780 and OAR 660, division 33, enacted or adopted pursuant to Goal 3, prohibit the division of EFU-zoned land into parcels less than 80 acres and establish standards for development of dwellings on existing or proposed parcels on that land. Goal 14 (Urbanization) generally prohibits urban development outside of acknowledged urban growth boundaries or unincorporated rural communities. Goal 14 would not allow rural residential development at a density of one acre, as desired by the claimants.

ORS 215.780 establishes an 80-acre minimum size for the creation of new lots or parcels in EFU zones and became effective on November 4, 1993 (Chapter 792, Oregon Laws 1993).

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<sup>2</sup> This report addresses only those state statutes and rules administered by the department. Statutes and rules administered by the Oregon Department of Transportation and the Oregon Department of State Lands are addressed in reports by those agencies.

<sup>3</sup> The claimants’ property is “agricultural land” because it contains Natural Resources Conservation Service Class I-IV soils.

ORS 215.263 (2005 edition) establishes standards for the creation of new parcels for non-farm uses and dwellings allowed in an EFU zone.

Land that is zoned EFU and that is "high-value" farm land under Goal 3, ORS 215.710 and OAR660, division 33, is subject to additional restrictions based on certain provisions of ORS 215 and OAR 660, division 33.

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. The Commission subsequently adopted amendments to comply with House Bill 3326 (Chapter 704, Oregon Laws 2001, effective on January 1, 2002), which were effective on May 22, 2002. (See administrative rule history for OAR 660-033-0100, -0130 and -0135.)

The claimants acquired the subject property on November 29, 1974, after the adoption of Senate Bill 100 (Chapter 80, Oregon Laws 1973, effective on October 5, 1973) but before the adoption of the statewide planning goals, effective on January 25, 1975. At that time, it was zoned General Use by Clackamas County, which allowed residential development of one-acre property without access to public water.

During the period between October 5, 1973, and January 25, 1975, ORS 197.175(1) and 197.280 (1973 editions) required, in addition to any local plan or zoning provisions, that cities and counties exercise their planning responsibilities in accordance with the interim land use planning goals set forth in ORS 215.515 (1973 edition). *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 Or App. 525 (1981) (noting that while "[I]and use planning responsibility is not defined in ORS ch 197, the Supreme Court has interpreted that term as including annexation approvals, *subdivision approvals* [emphasis added] and partition approvals") citing *Petersen*, *Meeker* and *Alexanderson v. Polk County*, 285 Or 427 (1980). The claimants' desired use includes subdivision of their land. 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.<sup>4</sup>

The following interim goals are directly applicable to this claim: "To preserve the quality of the air, water and *land* [emphasis added] resources of the state"; "To conserve prime farm lands for the production of crops"; "To provide for the orderly and efficient transition from rural to urban

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<sup>4</sup> The "interim" land use goals are set forth in ORS 215.515(1)(a) to (j) (1973 edition) 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 the development of properties within the state is commensurate with the character and the physical limitations of the land." ORS 215.515 (1973 edition).

land use”; “To protect life and property in areas subject to floods, landslides and other natural disasters”; “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”; and “To develop a timely, orderly and efficient arrangement of public facilities and services to serve as a framework for urban and rural development.” ORS 215.515 (1973 edition).

One of the interim goals was to “conserve prime farm lands for the production of crops.” Soil types are a primary determinant of prime farm land. Somewhere between about 48 and 70 percent of the soils on the 67.91-acre property are identified as Aloha, McBee and Woodburn “prime” soils by the Natural Resource Conservation Service (NRCS) and the remaining portion is composed of Xerochrepts and Haploxerolls, non “prime” soils by NRCS.<sup>5</sup> The subject property appears to be predominantly surrounded by EFU-zoned farm land.

The claim does not establish that the approval of one-acre parcels for residential use complies with the interim planning goals. To the contrary, and in particular, the desired division and development of the “prime farm land,” would not “conserve prime farm lands for the production of crops” as required by the interim goals in effect at the time the claimants acquired the subject property in 1974.

With regard to the “non-prime soils” portion of the subject property, subsection (e) of the interim goals is to “provide for the orderly and efficient transition from rural to urban lands.” The wording of this interim goal is similar to the text of Goal 14, which has been interpreted by the courts in certain factual circumstances to prohibit rural residential development at the density the claimants desire.

No information has been provided establishing whether or to what extent the claimants’ desired division of the subject property for residential development complies with the interim planning goals set forth in ORS 215.515 (1973 edition) in effect at the time the claimants acquired the property on November 29, 1974.

### **Conclusions**

The current zoning requirements, minimum lot size and dwelling standards established by Goals 3 and 14, ORS 215 and OAR 660, division 33, were all enacted or adopted after the claimants acquired the subject property in 1974 and do not allow the desired division or development of the property. However, in 1974, the “interim” land use goals set forth in ORS 215.515 required, in part, the conservation of prime farm land for the production of crops. A portion of the claimants’ 67.91-acre property is composed of farm land soils rated as “prime” by NRCS. The portion of the subject property that is “prime farm land” could not be divided for residential use under the “interim” land use goals applicable in 1974.

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<sup>5</sup> Based on soils information submitted by the claimant, there is not agreement about the percentage of the subject property that is composed of “prime” and non “prime” farm land. The portion of the property that is “prime farm land” under the interim goal is most appropriately determined by Clackamas County when the claimant submits an application for a permit under the terms of this order and any order of the county under ORS 197.352.

Based on the facts of this claim, dividing the "prime farm land" portions of the property into one-acre parcels for residential use does not "conserve prime farm lands for the production of crops," "preserve the quality of the . . . land resources of the state," "provide for an orderly and efficient transition from rural to urban land use," "protect life and property in areas subject to floods" or provide for "a timely, orderly and efficient arrangement of public facilities and services" as required by ORS 215.515 (1973 edition). Thus, the requested use would not have been permitted under the standards in effect when the claimants acquired the subject property. Therefore, the department determines that the current land use regulations applicable to the subject property do not restrict its use relative to the uses allowed 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 subject property based on the uses that the claimants have identified. There may be other laws that currently apply to the claimants' use of the subject 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 subject 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 estimate of \$9,611,890 as the reduction in the subject property's fair market value due to current regulations. This amount is based on a complete appraisal of real property summary report submitted as an attachment to the claim on July 13, 2005.

### **Conclusions**

As explained in Section V.(1) of this report, the claimants are Kenneth and Betty Nanson and Jerry and Kathleen Rensch who acquired the subject property on November 29, 1974. Under ORS 197.352, the claimants 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 enacted or adopted since the claimants acquired the "non-prime soils" portion of the subject property may restrict the desired division and development of the property. The claimants estimate the reduction in value to the subject property due to the restrictions to be \$9,611,890.

As explained in section V.(2) of this report, current land use regulations do not restrict the use of the "prime soils" portion subject property relative to the uses allowed when the claimants acquired the property in 1974. Land use regulations enacted or adopted by the state since the claimants acquired the prime soil portion, relating to the desired division and development of the property, do not have "the effect of reducing the fair market value of the property, or any interest therein" relative to the uses allowed in 1974 because the claimants could not divide the subject

property when it was acquired in 1974. Thus, the claimants are not due compensation under ORS 197.352 regarding the prime soil portion of the subject property.

Although a real estate appraisal was included with the claim, without verification of whether or to what extent the claimants' desired use of the 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 property 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**

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 the statute.

#### **Findings of Fact**

The claim is based on state land use regulations that restrict the use of the subject property, including applicable provisions of Goals 3 and 14, ORS 215 and OAR 660, division 33, which Clackamas County has implemented through its current EFU zone. With the exception of applicable provisions of ORS 215, including the interim land use planning goals in effect on November 29, 1974, these state land use regulations were not in effect when the claimants acquired the property.

#### **Conclusions**

Without a specific development proposal for the subject property, it is not possible for the department to determine all the laws that 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, with the exception of provisions of ORS 215 in effect on November 29, 1974, the general statutory, goal and rule restrictions on division and development of the claimants' "non-prime lands" portion of the subject property were not in effect when the claimants acquired the property. As a result, these laws are not exempt under ORS 197.352(3)(E). Provisions of ORS 215, including the interim statewide planning goals in effect when the claimants acquired the subject property on November 29, 1974, are exempt under ORS 197.352(3)(E) and will continue to apply to the property.

It appears that the general statutory, goal and rule restrictions on residential development and use of farm land apply to the claimants' use of the "prime farm land" portion of the subject property, and with the exception of applicable provisions of ORS 215 in effect when the claimants acquired the property, these laws are not exempt under ORS 197.352(3)(E). However, as discussed in Section V.(2) of this report, these laws do not restrict the use of the subject property relative to uses permitted when the claimants acquired the property on November 29, 1974, because the claimants' desired use was not allowed under the provisions of ORS 215 in effect on that date.

Other laws in effect when the claimants acquired the subject 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 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 the subject 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. In some cases, some of these laws may be exempt under ORS 197.352(3)(A) to (D).

## VI. FORM OF RELIEF

ORS 197.352(2) provides for payment of compensation to an owner of private real property if the Commission or the department has enforced one or more laws that restrict 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 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 set forth in this report, laws enforced by the Commission or the department restrict the claimants' ability to divide only the "non-prime soils" portion of farm land into 1-acre parcels and to develop a dwelling on each parcel. The claim asserts that the laws enforced by the Commission or the department reduce the fair market value of the subject property by \$9,611,890. Although a real estate appraisal was included with the claim, without verification establishing 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.

Based on the record for this claim, the claimants have not established that any state laws enforced by the Commission or the department restrict the use of the portion of the subject property that is prime farm land, and have the effect of reducing the fair market value of the property. The portion of the property composed of "prime farm land" could not be divided for residential use under the "interim" land use goals applicable in 1974.

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 claimants Kenneth and Betty Nanson and Jerry and Kathleen Rensch to use the subject property for a use permitted at the time they acquired the property on November 29, 1974.

### Conclusions

Based on the current record, the claimants, Kenneth and Betty Nanson and Jerry and Kathleen Rensch, are not entitled to relief under ORS 197.352 with regard to the "prime farm land"

portion of the subject property. Department staff recommends that this claim be denied for the of "prime" farm land because neither the Commission nor the department has enforced laws that were enacted or adopted after the claimants acquired the subject property that restrict the claimants' use of the private real property relative to the uses permitted at the time they acquired the property on November 29, 1974.

Based on the record, the department recommends that the claim be approved with regard to the "non-prime farm land" portion of the subject property, 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 Kenneth and Betty Nanson and Jerry and Kathleen Rensch's division of the "non-prime farm land" portion of the subject property into 1-acre parcels or to their development of a dwelling on each parcel: applicable provisions of Goals 3 and 14, ORS 215 and OAR 660, division 33, enacted or adopted after November 29, 1974. 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 November 29, 1974.
2. The action by the State of Oregon provides the state's authorization to the claimants to use the non-prime farm land of the subject property for the use described in this report, subject to the standards in effect on November 29, 1974. On that date, the property was subject to the applicable provisions of ORS 215 then in effect, including the interim planning goals set forth in ORS 215.515 (1973 edition).
3. To the extent that any law, order, deed, agreement or other legally enforceable public or private requirement provides that the non-prime portion of 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 non-prime portion 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 non-prime portion of 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 April 25, 2006. OAR 125-145-0100(3), provided an opportunity for the claimants or the claimants' 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.

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

**OREGON DEPARTMENT OF TRANSPORTATION**

**Staff Report and Recommendation**

May 16, 2006

**STATE CLAIM NUMBER:** M 118701

**NAME OF CLAIMANT:** Kenneth Nanson, Betty Nanson,  
Jerry A. Rensch, Kathleen B. Rensch

**MAILING ADDRESS:** 14165 NW Linnmere Lane  
Portland, Oregon 97229

8370 SW Apple Way, J102  
Portland, Oregon 97225

2316 SW 15th Avenue  
Portland, Oregon 97201

**PROPERTY IDENTIFICATION:** Township 3S, Range 1E, Section 18 and 19  
Tax lot 2900  
Clackamas County

**OTHER CONTACT INFORMATION:** Joseph T. Hagen  
Hagen O'Connell, LLP  
121 SW Morrison, Suite 1500  
Portland, Oregon 97204

**DATE RECEIVED BY DAS:** July 1, 2005

**180-DAY DEADLINE:** May 16, 2006<sup>1</sup>

**I. SUMMARY OF THE CLAIM**

See Department of Land Conservation and Development (DLCD) Staff Report.

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<sup>1</sup> 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.

## II. SUMMARY OF STAFF RECOMMENDATION

Based on the preliminary findings and conclusions set forth below, the Department of Transportation (department) has determined that the claim is not valid. None of the statutes appear to apply to claimant's property or their development plan. Most of the statutes cited are not "land use regulations" at all. Of those that could be considered land use regulations, all but one are exempt because the claimants acquired the property after the adoption of those state laws. Based on the foregoing findings and conclusions, the claimant has not established entitlement to relief under ORS 197.352(1) as to laws administered by the department. As a result, the department recommends that the claim be denied as to those laws.

## III. COMMENTS RECEIVED

On July 25, 2005, pursuant to OAR 125-145-0080, the Department of Administrative Services (DAS) provided written notice to owners of surrounding properties. According to DAS, the only comment received in response to the 10-day notice was a letter from the organization Thousand Friends of Oregon. On May 8, 2006, DAS received comments from the Claimants' representative. Those comments have been taken into consideration in formulating the Department of Transportation's report.

## IV. TIMELINESS OF CLAIM

### Requirement

See Department of Land Conservation and Development (DLCD) Staff Report.

### Findings of Fact

The claim was brought on July 1, 2005, which is within two years of the effective date of the measure (December 2, 2004).

### Conclusions

The claim has been submitted within two years of the effective date of the measure and therefore is 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 findings of the Draft Staff Report of the Department of Land Conservation and Development on this claim regarding ownership are incorporated into this report by this reference.

## **Conclusions**

The conclusions of the Draft Staff Report of the Department of Land Conservation and Development on this claim regarding ownership are incorporated into this report by this reference.

## **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 “state land use regulation” 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 claimants or a family member acquired the property.

## **Findings of Fact**

The claim states “[a]t the time of purchase, the property was zoned ‘General Use,’ which allowed residential development of 20,000 square feet per unit (with a public water supply), and of one acre per unit (without a public water supply).” The claim states the current value of the property under the existing regulations, and compares it to the value projected “if developed as a subdivision with 2 units per acre....”

In the claim submitted to DAS, the claimants attached a chart listing numerous statutes and regulations, their “title” for those laws, a category they named “date of property impact,” and a category they named “effect.” They cited the following series of Oregon Revised Statutes: ORS 377.030 - 540. Their stated title for this series is “trees; historic and scenic highways; scenic areas.” Their stated date of property impact is 1977. And their stated effect is “rules governing highway beautification.” They include a footnote after the ORS citations that says, “[t]he highway beautification provisions of ORS 377 are governed by the federal Highway Beautification Act of 1965, 23 USC §§131, 136. This statute mandates the withholding of federal highway funds for non-compliance; it is not a mandate.”

The statutes cited in that series, with their actual titles, are as follows. Omitted ORS numbers are non-existent or have been repealed.

ORS 377.030 Destruction or removal of trees on state highways without permission prohibited.

ORS 377.040 Application to department to remove trees along state highways.

ORS 377.050 Consent of Department for removal of trees along state highways.

ORS 377.100 Study of highway system; designation of historic and scenic highways.

- ORS 377.105 Effect of designation as historic and scenic highway.
- ORS 377.505 Definitions for ORS 377.505 to 377.540.
- ORS 377.510 Signs visible from public highways regulated; junkyards prohibited; exceptions.
- ORS 377.515 Removal of nonconforming signs deferred.
- ORS 377.521 Status of previously designated scenic areas.

In order for a claimant to establish an entitlement to relief under ORS 197.352, there must be a showing of at least the following:

- The use of the claimant's property is restricted by a state "land use regulation";
- The state agency has taken some action, after December 2, 2004, to enforce the land use regulation;
- The enforcement of the land use regulation also reduces the fair market value of the property in question; and
- The law is not one that was adopted to protect public health and safety, or that is otherwise exempt under ORS 197.352(3).

a) ORS 377.030 - .050

ORS 377.030 to 377.050 restrict the ability of private citizens to cut down trees and other vegetation on state highway right of way. These statutes do not control private parties' use of their own land, but rather control what private parties may do on state owned right of way. They are, therefore, not "land use regulations" at all. In addition, the state has taken no action to enforce ORS 377.030 - .050 since December 2, 2004, against the claimants' use of their property.

b) ORS 377.100 - .105

ORS 377.100 and 377.105 create a method for designating Historic & Scenic Highways, and describe what the Department is required or permitted to do to preserve the highway or highway related features so designated. These statutes do not control private parties' use of their own land, but rather control what the state may do on state owned right of way. They are, therefore, not "land use regulations" at all. Also, the parcel does not appear to be visible to any location designated a Historic and Scenic Highway. Claimants have not described any way in which the statute has impacted or would impact their desired use of the property, and the Department can discern none. In addition, the state has taken no action to enforce ORS 377.100 - .105 since December 2, 2004, against the claimants' use of their property.

c) ORS 377.505 - .521

ORS 377.505 to 377.521 is the remainder of the Designated Scenic Areas Act (the rest of which was repealed in 1977). This Act originally provided a method for the designation of highway stretches as Scenic based on their historic significance or scenic beauty. Off-premise signs that existed as of the designation date were required to be removed within seven years. That requirement remains (ORS 377.515), but no new designations have been made since 1971, and the method for adding designations has been repealed. Under current statutes no new off-premise signs are allowed, and most junkyards within such a stretch must be screened from view or removed. The parcel at issue does not appear to

about any state highway that has been designated a Scenic Area. Claimants have not described any way in which the statute has impacted or would impact their plan, and the Department can discern none. In addition, the state has taken no action to enforce ORS 377.505 - .521 since December 2, 2004, against the claimants' use of their property.

### **Conclusions**

Several of the laws cited in the claim (ORS 377.030 - .105) are not state "land use regulations." As for those laws that can be construed as "land use regulations" (ORS 377.505 - .521), they do not appear to restrict the use of claimants' desired use or their property because there are no Designated Scenic Areas within view of the property. The claimants have failed to identify a state land use regulation that has been enforced as to the claimants' use of the property in a manner that restricts its use. Since December 2, 2004, the department has not enforced a land use regulation under the cited statutes.

### **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**

Claimants assert a claim for \$9,611,190.00. The claim describes the current value of the property and the projected value with the addition of a residential development. There is no proposal to cut trees on state property, no proposal to affect a designated Historic & Scenic Highway, no proposal to erect outdoor advertising signs, and no proposal to do anything that, by a reasonable reading of the claim, is impacted by any of the statutes cited. Claimants have not put forth any information on reduction in value based on the cited statutes, and the department can see none.

### **Conclusions**

To state a claim under ORS 197.352, claimants must allege some reduction in fair market value of their property caused by a land use regulation that restricts the use of the property. Based on the record currently before the department, the department concludes that there are no land use regulations identified in the claim and enforced by the department since December 2, 2004, that restrict the use of the subject property or that have the effect of reducing the fair market value.

#### **4. Exemptions under ORS 197.352(3)**

ORS 197.352 does not apply to certain land use regulations. The type of land use regulations not subject to a claim for compensation under ORS 197.352 are set forth in section 3 of the statute.<sup>2</sup>

#### **Findings of Fact**

ORS 197.352(3)(E) states that the act does not apply to land use regulations enacted prior to the date of acquisition of the property by the owner.

a) ORS 377.030 - .050

As discussed above, ORS 377.030 to 377.050 are not “land use regulations” at all. The statutes were passed in 1921 (General Laws of Oregon, 1921, Chapter 175). The statutes predate the claimants’ acquisition of the property.

b) ORS 377.100 - .105

As discussed above, ORS 377.100 and 377.105 are not “land use regulations” at all. The statutes were passed in 1983, so the property ownership predates these statutes.

c) ORS 377.505 - .521

ORS 377.505, 377.510, and 377.515 were passed in 1961. Amendments since then have not affected the substance of the regulation, so these statutes predate the claimants’ acquisition of the property. ORS 377.521 was passed in 1977 so the property ownership predates this statute.

#### **Conclusions**

Based on the information in the record, claimants acquired the property on November 29, 1974. Claimants acquired the property after the passage ORS 377.030 through 377.050 and 377.505 through 377.515. Therefore claimants are not entitled to compensation or waiver of regulation based on those statutes because they did not own the property before the enactment of these specific regulations.

### **VI. FORM OF RELIEF**

ORS 197.352(1) provides for payment of compensation to an owner of private real property if the department has enacted or enforced a law that restricts the use of the property in a manner that reduces its fair market value. In lieu of compensation, the

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<sup>2</sup> In their list of statutes that is part of the claim packet, claimants include a footnote that states, “[t]he highway beautification provisions of ORS 377 are governed by the federal Highway Beautification Act of 1965, 23 USC §§ 131, 136. This statute mandates the withholding of federal highway funds for non-compliance; it is not a mandate.” Presumably claimants refer to the exemption for regulations passed to comply with federal law (ORS 197.352(3)(C)). None of the statutes cited are governed by the federal Highway Beautification Act (HBA). Therefore the department will not address whether the HBA is a federal requirement under the meaning of ORS 197.352.

department may choose to not apply the law to allow the present owner to carry out a use of the property permitted at the time the present owner acquired the property.

### **Findings of Fact**

Based on the findings and conclusions set forth in this report, the department has not enforced state land use regulations that restrict the claimant's use of the property in a manner that reduces the fair market value of the property. None of the statutes appear to apply to claimants' desired use of their property. Most of the statutes cited are not "land use regulations" at all. Of those that could be considered land use regulations, ORS 377.505 to .515 are exempt because the claimants acquired the property after the adoption of those state laws.

### **Conclusion**

Based on the foregoing findings and conclusions, the claimant has not established entitlement to relief under ORS 197.352(1) as to laws administered by the department. As a result, the department recommends that the claim be denied.

## **VII. NOTICE OF OPPORTUNITY TO COMMENT**

The department issued its draft staff report on this claim on April 25, 2006. OAR 125-145-0100(3), provided an opportunity for the claimants or the claimants' 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.

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

**OREGON DEPARTMENT OF STATE LANDS**

**Final Staff Report and Recommendation  
May 16, 2006**

**OREGON CLAIM NUMBER:** M118701

**NAME OF CLAIMANT(S):** Kenneth Nanson  
Betty Nanson  
Jerry and Kathleen Rensch

**MAILING ADDRESSES:** 14165 NW Linnere Lane  
Portland, Oregon 97229

8370 NW Apple Way, J102  
Portland, Oregon 97225

2316 SW 15th Ave  
Portland, Oregon 97201

**IDENTIFICATION OF PROPERTY:** Township 3S, Range 1E, Section 18  
Tax Lot 2900  
Clackamas County

**OTHER CONTACT INFORMATION:** Joseph T. Hagen  
Hagen O'Connell LLP  
121 SW Morrison, Suite 1500  
Portland, Oregon 97204

**DATE RECEIVED BY DAS:** July 1, 2005

**180—DAY DEADLINE:** May 16, 2006<sup>1</sup>

**I. SUMMARY OF CLAIM**

Kenneth Nanson, Betty Nanson, and Jerry and Kathleen Rensch are the claimants. The claimants seek compensation in the amount of \$9,611,890 for the reduction in the fair market value of the property they allege has resulted from the enforcement of certain land use regulations to restrict their use of the property. The state land use regulation that is

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<sup>1</sup> In *Macpherson v. Dep't of Admin. Servs.*, 340 Or \_\_, 2006 Ore. LEXIS 104 (February 21, 2006), the Marion County trial court entered an order suspending all timelines under ORS 197.352. This order was in effect for a period of 139 days, extending the 180-day deadline under ORS 197.352(6) by that same period.

administered by the Department of State Lands (DSL) and that is a basis for the claim is the Removal-Fill Law (ORS 196.600 to 196.990), relating to regulation of removal or fill in wetlands. The use the claimants desire to carry out that is alleged to be prohibited, limited or otherwise restricted by a state land use regulation is to divide the 67.91-acre property into 1-acre parcels and to develop a dwelling on each parcel.

## II. SUMMARY OF STAFF RECOMMENDATION

Based on the findings and conclusions set forth below, the Department of State Lands (DSL) has determined that this claim does not meet the requirements for relief under ORS 197.352 as to laws administered by DSL. As a result, DSL staff recommend that the claim be denied as to state land use regulations administered by DSL.

## III. COMMENTS

Pursuant to OAR 125-145-0080, the Department of Administrative Services (DAS) sent notices of this claim to owners of surrounding properties and other interested parties. According to DAS, one comment was received in response to the 10-day notice. The department has considered the comment in preparing this report.

## IV. TIMELINESS OF THE 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 December 2, 2004, written demand for compensation must be made on or before December 2, 2006, or the date the public entity applies the land use regulation as an approval criteria to an application submitted by the owner of the property, whichever is later.
2. For claims arising from land use regulations enacted after December 2, 2004, written demand for compensation must be made 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 July 1, 2005, for processing under OAR Chapter 125. The claim identifies Oregon Revised Statutes and Oregon Administrative Rules pertaining to removal and fill of material within wetlands, statewide land use planning, subdivisions and partitions as amended since 1974 and county planning and zoning as the

basis for the claim. Only laws that were enacted prior to December 2, 2004, the effective date of Measure 37, are the basis for this claim.

### **Conclusions**

The claim has been submitted on or before December 2, 2006. The claim is directed at land use regulations enacted before December 2, 2004. As a result, the claim is timely.

## **V. ANALYSIS OF THE CLAIM**

### **1. Present Owner(s) of the Property**

#### **Requirement**

ORS 197.352 provides a right to compensation to the *present* owner of the property, under certain circumstances. As a result, the first question that must be answered is whether the claimant is a present owner of the property.

#### **Findings of Fact**

The property that is identified in this claim is T3S, R1E, Sec. 18, Tax Lot 2900 in Clackamas County, Oregon. The claim is substantiated by a contract of sale and a warranty deed. The Clackamas County Assessor's Office confirmed that the claimants are the current owners of the subject property.

#### **Conclusions**

Based on the above findings, and those of the Department of Land Conservation and Development in its report on this claim, the claimants, Kenneth Nanson, Betty Nanson, and Jerry and Kathleen Rensch are owners of the subject property.

### **2. Date of Acquisition**

#### **Requirement**

Under ORS 197.352, a claim may be made only for laws that took effect after the present owner or family member of the present owner acquired the property. Under ORS 197.352, the right to compensation is dependent on the date when the present owner or a family member of the present owner acquired the property. A family member is defined as the wife, husband, son, daughter, mother, father, brother, brother-in-law, sister, sister-in-law, son-in-law, daughter-in-law, mother-in-law, father-in-law, aunt, uncle, niece, nephew, stepparent, stepchild, grandparent, or grandchild of the present owner of the property, an estate of any of the foregoing family members, or a legal entity owned by any one or combination of these family member or the present owner of the property.

Establishing the date of acquisition is key to determining what state laws are involved, and therefore whether the claimants' use of the property has been restricted and the fair market value of the property has been reduced.

### **Findings of Fact**

The claim alleges the claimants, Kenneth Nanson, Betty Nanson, and Jerry and Kathleen Rensch have owned the property since 1974. The claim includes a contract and deed to substantiate this. Kenneth Nanson, acquired a ½ interest in the subject property with his wife, Betty Nanson, as tenants in entirety, and Jerry and Kathleen Rensch, acquired a ½ interest in the subject property, as tenants in entirety, on November 29, 1974, as reflected by a contract of sale included with the claim. In 1982, Kenneth and Betty Nanson were divorced and their interest was converted from tenants in entirety to tenants in common. The contract of sale was fulfilled, on September 19, 1989, as reflected by a warranty deed included with the claim.

### **Conclusions**

The claimants, Kenneth Nanson, Betty Nanson, and Jerry and Kathleen Rensch are present owners of an interest in the property. The claimants acquired their interest in the property on November 29, 1974.

#### **3. The Desired Use of the Property**

The claim indicates the desired use of the property is to divide the 67.91-acre property into one- or two-acre parcels and to develop a dwelling on each parcel.

#### **4. Current State Laws that Restrict the Desired Use of the Property**

##### **Requirement**

In order for a person to have a right to compensation for an existing state law under ORS 197.352, the law must be a state "land use regulation" that is being enforced, and the law must restrict the claimants' desired use of the property. Not all laws are "land use regulations." Under ORS 197.352 a state land use regulation is: (a) a Statewide Land Use Planning Goal of LCDC; (b) a rule of LCDC; (c) statutes and rules that regulate farming and forest practices; and (d) any statute regulating the use of land or any interest therein.

### **Findings of Fact**

The State Removal-Fill Law has regulated fill and removal within waters of the state since 1979. The Department of State Lands has not made a wetland determination, a Local Wetland Inventory does not exist, and no wetland delineation has been completed for this parcel. The National Wetland Inventory shows a wetland or waterway of some sort on the parcel.

The claimants have not applied for a removal-fill permit from the state under ORS 196.800 to 196.990 and DSL has not taken any enforcement action on this parcel since December 2, 2004.

The claim lists both statutes and rules administered by DSL: ORS 196.600 to 196.990, and OAR 141-085. The statutes are Oregon's Removal-Fill Law, which generally require a permit for the removal or fill of material in waters of the state, including wetlands. The rules listed in the claim are a portion of the administrative rules governing the removal or fill of material in waters of the state, including wetlands. The rules are not "state land use regulations" as that term is defined in ORS 197.352.

### **Conclusions**

The statutes listed in the claim are state land use regulations under ORS 197.352. The rules listed in the claim are not state land use regulations under ORS 197.352. DSL has not enforced the listed statutes or rules with regard to this property since December 2, 2004, and the claimant has not applied for a state permit to remove or fill within wetlands on the property. Until the claimants submit an application for a removal-fill permit, DSL has no means of determining whether the listed statutes restrict the claimant's desired use of the property (subdivision). The Removal-Fill Law regulates fill and removal of material within "waters of the state," not subdivision or partition of property.

## **5. Laws in Effect When the Present Owners Acquired the Property**

### **Requirement**

ORS 197.352 requires the state to compensate the present owners of the property if a current state law restricts the use of the property. If the state is paying compensation, then the amount of compensation is determined by the difference in fair market value of the property with the current state land use regulations in place and the fair market value of the property if it were subject to whatever state land use regulations applied to the property when it was acquired by the present owners or a family member of the present owners (whichever occurred first). If the state elects not to pay compensation, however, it may only allow the present owners to use the property for a use permitted when they acquired the property (not when it was acquired by a family member).

As a result, in this section the report summarizes both the laws that were in effect when the present owners acquired the property, and the laws in effect when a family member of the owners acquired the property (if a family member conveyed the property to the present owners).

### **Findings of Fact**

Since 1979, the Removal-Fill Law has required a permit for removal or fill within wetlands, and required DSL to include in such permits conditions designed to mitigate for

impacts to wetlands. When the claimants acquired the property in 1974, there was no such requirement in state law. The use that the claimants state in their claim is to subdivide or partition the property into rural residential lots. A portion of the property does appear to be a wetland of some sort based on the National Wetland Inventory. If the claimants propose to construct dwellings, and if the location of the dwellings is on land that is identified as jurisdictional wetland, then state statutes administered by the Department of State Lands may require a permit for filling and/or removing more than 50 cubic yards of material within any such wetland.

Until the claimants submit an application for a removal-fill permit, however, DSL is unable to determine whether state land use regulations administered by DSL restrict the use of the property. In addition, under ORS 197.352(1), DSL is authorized to provide relief to claimants only when it has enforced an existing state law through some action taken after December 2, 2004. In this case DSL has not taken any action to enforce the state Removal-Fill Law as to this property after December 2, 2004.

### **Conclusions**

The claimants acquired the property before the Removal-Fill Law began regulating fill and removal within wetlands in 1979. However, DSL has not taken any action to enforce the state Removal-Fill Law as to this property after December 2, 2004.

## **6. Effect on Fair Market Value**

### **Requirement**

There is a right to compensation under ORS 197.352 from the state only if the state enforces an existing land use regulation, and that results in a reduction in the fair market value of the property.

### **Findings of Fact**

The claim includes an estimate of \$9,611,890 as the reduction in the subject property's fair market value due to current regulations. This amount is based on a complete appraisal of real property summary report submitted as an attachment to the claim on July 13, 2005.

### **Conclusions**

As explained in Section V.(2) of this report, the claimants are Kenneth Nanson, Betty Nanson, and Jerry and Kathleen Rensch, who acquired the subject property on November 29, 1974. Under Ballot Measure 37, the claimants are due compensation for land use regulations that restrict the use of the subject property in a manner that reduces its fair market value.

Although a real estate appraisal was included with the claim, the appraisal does not appear to be based on state land use regulations that are administered by DSL and that have been enforced since December 2, 2004. As a result, DSL is unable to determine that there is any restriction on the claimants' desired uses of the property or any reduction of the fair market value of the property.

## **7. Exemptions**

### **Requirement**

ORS 197.352 does not apply to state land use regulations that:

- Restrict or prohibit activities commonly and historically recognized as public nuisances under common law;
- Restrict or prohibit activities for the protection of public health and safety, such as fire and building codes, health and sanitation regulations, solid or hazardous waste regulations, and pollution control regulations;
- To the extent the land use regulation is require to comply with federal law;
- Restrict or prohibit the use of a property for the purpose of selling pornography or performing nude dancing; or that were
- Enacted prior to the date of acquisition of the property by the owner or a family member of the owner who owned the subject property prior to acquisition or inheritance by the owner, whichever occurred first.

### **Findings of Fact**

The claim is based on the provisions of the state Removal-Fill Law (ORS 196.800 to 196.990) that were enacted in 1979. Kenneth Nanson, Betty Nanson, and Jerry and Kathleen Rensch acquired an interest in the property in 1974. As a result, the state Removal-Fill Law does not appear to be specifically exempt under ORS 197.352(3)(E). Other exemptions may apply to laws that may restrict the claimants' desired use of the property.

The claimants should be aware that depending on the nature of the use of the property that is finally proposed, one or more of the exemptions in ORS 197.352(3)(A)-(D) may apply. However, until the claimants applies for a removal-fill permit, DSL is unable to determine what laws and what exemptions may apply.

### **Conclusions**

This report addresses only those state laws that are identified in the claim, or that DSL is certain apply to the property based on the use(s) 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 DSL in the claim. The State Removal-Fill Law does not appear to come under the exemption in ORS 197.352(3)(E). However, there may be other laws that continue to apply to the claimants' use of the property because they were not identified in the claim. Claimants should be aware that

the less information they provide to DSL 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**

### **1. Is the Present Owner Entitled to Relief**

#### **Requirement**

A claimant is entitled to relief if:

- The claimants are present owners of the property, or an interest in the property;
- A state land use regulation enacted before December 2, 2004 is being enforced against the claimants' use of the property;
- The state land use regulation that is being enforced restricts the claimants' use of the property; and
- The restriction reduces the fair market value of the property, relative to how the property could be used when the present owners or a family member of the present owners acquired the property.

The state may either pay compensation, or not apply the state land use regulation(s) in question.

#### **Findings of fact**

Based on the information currently in its record, the claim does not provide sufficient facts to qualify for relief under ORS 197.352.

#### **Conclusions**

DSL staff denies this claim as to state land use regulations administered by DSL because the Removal-Fill Law (the state land use regulation identified by claimant) has not been enforced by DSL as to the claimants' use of this property since December 2, 2004. In addition, the Removal-Fill Law does not prohibit development of a wetland area. Rather, that law simply requires a permit for removal or filling of more than 50 cubic yards of material within a wetland. Until the claimants apply for a permit and DSL has acted on the permit application, DSL has not enforced the Oregon Removal-Fill Law and it is not possible to determine whether that law would restrict use of this property and reduce its fair market value.

## **VII. COMMENTS ON THE DRAFT STAFF REPORT**

DSL issued its draft staff report on April 25, 2006. OAR 125-145-0100(3), provided an opportunity for the claimants or the claimants' authorized agent and any third parties who submitted comments under OAR 125-145-0080 to submit written comments, evidence or information in response to the draft staff report and recommendation. Comments were received from the claimants' attorney and have been considered by the DSL in the issuance of the final report.