

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. M121427
(BALLOT MEASURE 37) OF)	
Joanne Kopser, Salvador and)	
Sandra Medina, CLAIMANTS)	

Claimants: Joanne Kopser, Salvador and Sandra Medina (the Claimants)

Property: Township 3S, Range 1E, Section 14, Tax lot 400
Township 3S, Range 1E, Section 14, Tax lot 401
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 Joanne Kopser's division of tax lot 400 and Salvador and Sandra Medina's division of tax lot 401: applicable provisions of Goal 14 and OAR 660-004-0040. These laws will not apply to the Joanne Kopser only to the extent necessary to allow her to use tax lot 400 for the use described in this report, and only to the extent that use was permitted when she acquired the property on July 1, 1971. These laws will not apply to Salvador and Sandra Medina only to the extent necessary to allow them to use tax lot 401 for the use described in this report, and only to the extent that use was permitted when they acquired tax lot 401 on August 24, 1994.
2. The action by the State of Oregon provides the state's authorization to Joanne Kopser to use the tax lot 400 for the use described in this report, subject to the standards in effect on July 1, 1971, and provides the state's authorization to Salvador and Sandra Medina to use tax lot 401, subject to the standards in effect on August 24, 1994. On August 24, 1994, the property was subject to the applicable provisions of Goal 14 then in effect.

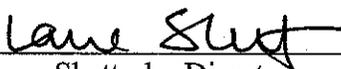
3. To the extent that any law, order, deed, agreement or other legally enforceable public or private requirement provides that the subject property may not be used without a permit, license or other form of authorization or consent, the order will not authorize the use of the property unless the claimants 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 23rd day of May, 2006.

FOR the DEPARTMENT OF ADMINISTRATIVE
SERVICES:



Dugan Petty, Deputy Administrator
DAS, State Services Division
Dated this 23rd day of May, 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 197.352¹, the present owner of the property, or any interest therein, shall have a cause of action in the circuit court in which the real property is located.

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

FOR INFORMATION ONLY

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

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

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

May 23, 2006

STATE CLAIM NUMBER: M121427

NAMES OF CLAIMANTS: Joanne Kopser
Salvador and Sandra Medina

MAILING ADDRESS: Joanne Kopser
20300 South May Road
Oregon City, Oregon 97045

Salvador and Sandra Medina
20328 South May Road
Oregon City, Oregon 97045

PROPERTY IDENTIFICATION: Township 3S, Range 1E, Section 14
Tax lot 400

Township 3S, Range 1E, Section 14
Tax lot 401
Clackamas County

DATE RECEIVED BY DAS: July 15, 2005

180-DAY DEADLINE: May 30, 2006¹

I. SUMMARY OF CLAIM

The claimants, Joanne Kopser and Salvador and Sandra Medina, seek compensation in the amount of \$627,000 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 subject property consisting of 5.3-acre tax lot 400 and 5-acre tax lot 401. The subject property is located at the geographic coordinates provided above, near Oregon City, in Clackamas County. (See claim.)

¹ 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).

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 Joanne Kopser's claim as to tax lot 400 and Salvador and Sandra Medina's claim as to tax lot 401 are 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 Joanne Kopser's division of 5.3-acre tax lot 400 and to Salvador and Sandra Medina's division of 5-acre tax lot 401: applicable provisions of Statewide Planning Goal 14 (Urbanization) and Oregon Administrative Rules (OAR) 660-004-0040. These land use regulations will not apply Joanne Kopser only to the extent necessary to allow her to use tax lot 400 for the use described in this report, and only to the extent that use was permitted when she acquired the subject property on July 1, 1971. These laws will not apply to Salvador and Sandra Medina only to the extent necessary to allow them to use tax lot 401 for the use described in this report, and only to the extent that use was permitted when they acquired tax lot 401 on August 24, 1994.

Based on the preliminary findings and conclusions set forth below, the department has further determined that Joanne Kopser's claim as to tax lot 401 and Salvador and Sandra Medina's claim as to tax lot 400 are not valid because the claimants have not established Joanne Kopser's current ownership of tax lot 401 or Salvador and Sandra Medina's current ownership of tax lot 400. (See the complete recommendation in Section VI. of this report.)

III. COMMENTS ON THE CLAIM

Comments Received

On August 3, 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, three written comments, evidence or information were received in response to the 10-day notice.

The comments do 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 letters in the department's claim file.)

IV. TIMELINESS OF CLAIM

Requirement

ORS 197.352(5) requires that a written demand for compensation be made:

1. For claims arising from land use regulations enacted prior to the effective date of 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 15, 2005, for processing under OAR 125, division 145. The claim identifies "OAR 660-004-0040(7)(a) and (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 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 ORS 197.352. ORS 197.352(11)(C) defines "owner" as "the present owner of the property, or any interest therein."

Findings of Fact

Claimant Joanne Kopser acquired tax lot 400 on July 1, 1971,² as reflected by a contract and warranty deed included with the claim. Based on evidence submitted with the claim, tax lot 401 was divided from tax lot 400 in 1994. Based on the results of research by the Clackamas County Assessor's Office, Joanne Kopser transferred tax lot 401 to her daughter Sandra Medina and son-in-law Salvador Medina through a warranty deed on August 24, 1994. The Clackamas County Assessor's Office confirms that claimant Joanne Kopser is a current owner of tax lot 400, and claimants Salvador and Sandra Medina are current owners of tax lot 401.

Conclusions

Claimant Joanne Kopser is an "owner" of tax lot 400 as that term is defined by ORS 197.352(11)(C) as of July 1, 1971. Claimants Salvador and Sandra Medina are "owners" of tax lot 401, as that term is defined by ORS 197.352(11)(C), as of August 24, 1994. Joanne Kopser is a "family member" of Sandra and Salvador Medina, as defined by ORS 197.352(11)(A), as of July 1, 1971. Based on the information submitted with the claim,

² The claim asserts Joanne Kopser had a lease to own option in 1969. However, there is no evidence or documentation to substantiate this date. Additional information will need to be provided by the claimants to substantiate that acquisition date and the nature of the interest acquired.

Joanne Kopser is not an owner of tax lot 401, and Sandra and Salvador Medina are not owners of tax lot 400.

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 subject tax lots and that "OAR 660-004-0040(7)(a) and (8)(e)" restrict that desired use.

The claim is based generally on Clackamas County's current Farm-Forest Acre District (FF-10) zone and the applicable provisions of state law that require such zoning. The county's FF-10 zone is a rural residential zone as required by Goal 14, which generally requires that land outside of urban growth boundaries 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,³ 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 states that the creation of a new lot or parcel smaller than two acres in a rural residential area is considered an urban use and provides that after October 4, 2000, an exception to Goal 14 is required to create a lot or parcel in a rural residential zone that is smaller than two acres or smaller than the county's minimum lot size standard if greater than two acres. Because Clackamas County's FF-10 zone requires a minimum lot size of 10 acres, the 5.3-acre property cannot be divided as desired by the claimants without a Goal 14 exception.

Joanne Kopser acquired the subject property in 1971, prior to the adoption of the statewide planning goals and their implementing statutes and rules. At that time, no state regulation applied to the subject property.

Conclusions

The minimum lot size requirements for rural residential lots or parcels established by Goal 14 and OAR 660-004-0040 were adopted since Joanne Kopser acquired the subject property in 1971 and do not allow the desired division of the 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 use that the claimants have identified. There may be other laws that currently apply to the claimants' use of the subject property, and that may

³ *1000 Friends of Oregon v. LCDC (Curry County)*, 301 Or 447 (1986).

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 \$627,000 as the reduction in the subject property's fair market value due to current regulations. The amount is based on the claimants' estimate.

Conclusions

As explained in Section V.(1) of this report, the claimants are Joanne Kopser who acquired the subject property on July 1, 1971, and her daughter Sandra Medina and son-in-law Salvador Medina. 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 Joanne Kopser acquired the subject property restrict the desired division of the property. The claimants estimate the reduction in value to be \$627,000.

Without an appraisal or other documentation, it is not possible to substantiate the specific dollar amount the claimants demand for compensation. Nevertheless, based on the submitted information, the department determines that it is more likely than not that 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(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, which Clackamas County has implemented through its FF-10 zone. Both of these land use regulations were adopted after Joanne Kopser acquired the subject 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 none of the general goal and rule restrictions on divisions of rural residential land were in effect when Joanne Kopser acquired the subject property in 1971. As a result, these laws are not exempt under ORS 197.352(3)(E).

Laws in effect when Joanne Kopser 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 their 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. 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(1) 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 Joanne Kopser's ability to divide 5.3-acre tax lot 400 and Salvador and Sandra Medina's ability to divide 5-acre tax lot 401. The claim asserts that the laws enforced by the Commission or the department reduce the fair market value of the subject property by \$627,000. However, because the claim does not provide an appraisal or other specific documentation for how the specified restrictions reduce the fair market value of the subject 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 subject property to some extent.

No funds have been appropriated at this time for the payment of claims. In lieu of payment of compensation, ORS 197.352 authorizes the department to modify, remove or not apply all or parts of certain land use regulations to allow Joanne Kopser to use tax lot 400 for a use permitted at the time she acquired tax lot 400 on July 1, 1971, and to allow Salvador and Sandra Medina to use tax lot 401 for a use permitted at the time they acquired tax lot 401 on August 24, 1994.

At the time Salvador and Sandra Medina acquired tax lot 401, it was subject to Clackamas County's acknowledged FF-10 zone and the requirements of Goal 14 then in effect. In addition to the applicable provisions of Goal 14 in effect on August 24, 1994, there may be other laws that apply to Salvador and Sandra Medina's use of tax lot 401 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 property until there is a specific proposal for that use. When the claimants seek a building or development

permit to carry out a specific use, it may become evident that other state laws apply to that use, and depending on when they were enacted or adopted, may continue to apply to the property. In addition, some of these laws may be exempt under ORS 197.352(3)(A) to (D) and will continue to apply to the property on that basis.

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 use that the claimants have identified. Similarly, this report only addresses the exemptions provided for under ORS 197.352(3) that are clearly applicable given the information provided to the department in the claim. The claimants should be aware that the less information they have provided to the department in their claim, the greater the possibility that there may be additional laws that will later be determined to continue to apply to their use of the subject property.

Conclusions

Based on the record before the department, the claimants have not established that Joanne Kopser is entitled to relief under ORS 197.352(1) as to tax lot 401 or that Salvador and Sandra Medina are entitled to relief under ORS 197.352(1) as to tax lot 400 because the claimants have not established Joanne Kopser's ownership of tax lot 401 or Salvador and Sandra Medina's ownership of tax lot 400. Therefore, the department recommends that Joanne Kopser's claim as to tax lot 401 and Salvador and Sandra Medina's claim as to tax lot 400 be denied.

Based on the record, the department further recommends that Joanne Kopser's claim as to tax lot 400 and Salvador and Sandra Medina's claim as to tax lot 401 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 Joanne Kopser's division of tax lot 400 and Salvador and Sandra Medina's division of tax lot 401: applicable provisions of Goal 14 and OAR 660-004-0040. These laws will not apply to the Joanne Kopser only to the extent necessary to allow her to use tax lot 400 for the use described in this report, and only to the extent that use was permitted when she acquired the property on July 1, 1971. These laws will not apply to Salvador and Sandra Medina only to the extent necessary to allow them to use tax lot 401 for the use described in this report, and only to the extent that use was permitted when they acquired tax lot 401 on August 24, 1994.
2. The action by the State of Oregon provides the state's authorization to Joanne Kopser to use the tax lot 400 for the use described in this report, subject to the standards in effect on July 1, 1971, and provides the state's authorization to Salvador and Sandra Medina to use tax lot 401, subject to the standards in effect on August 24, 1994. On August 24, 1994, the property was subject to the 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 May 9, 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.