

BEFORE THE DEPARTMENT OF ADMINISTRATIVE SERVICES,
THE DEPARTMENT OF LAND CONSERVATION AND DEVELOPMENT AND
THE DEPARTMENT OF TRANSPORTATION
OF THE STATE OF OREGON

IN THE MATTER OF THE CLAIM FOR)	FINAL ORDER
COMPENSATION UNDER ORS 197.352)	CLAIM NO. M121774
(BALLOT MEASURE 37) OF)	
John and Rosemary Williams, CLAIMANTS)	

Claimants: John and Rosemary Williams (the Claimants)

Property: Township 18S, Range 12E, Section 1, Tax lot 200, Deschutes 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) and the Oregon Department of Transportation (the ODOT 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 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 Rosemary Williams' division of the 40-acre property into five parcels of approximately seven to eight acres each and to her development of a dwelling on each parcel: applicable provisions of Goal 3, ORS 215 and OAR 660, division 33. These land use regulations will not apply only to the extent necessary to allow Rosemary Williams to use the subject property for the use described in this report, and only to the extent that use was permitted when she acquired the property on May 16, 1966.

In lieu of compensation under ORS 197.352, the State of Oregon will not apply the following laws to John Williams' division of the 40-acre property into five parcels of approximately seven to eight acres each and to his development a dwelling on each parcel: applicable provisions of Goal 3, ORS 215 and OAR 660, division 33, enacted or adopted after April 13, 2004. These land use regulations will not apply only to the extent necessary to allow John Williams to use the subject property for the use described in this report, and only to the extent that use was permitted

when he acquired the property on April 13, 2004. The department acknowledges that the relief to which John Williams is entitled under ORS 197.352 will not allow him to use the subject property in the manner set forth in the claim.

2. The action by the State of Oregon provides the state's authorization to the claimants to use the subject property for the use described in this report, subject to the standards in effect on May 16, 1966, for Rosemary Williams, and subject to the standards in effect on April 13, 2004, for John Williams. On April 13, 2004, the property was subject to applicable provisions of Goal 3, ORS 215 and ORS 660, division 33, currently 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).

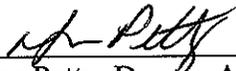
5. Without limiting the generality of the foregoing terms and conditions, in order for the claimants to use the subject property, it may be necessary for them to obtain a decision under ORS 197.352 from a city and/or county and/or metropolitan service district that enforces land use regulations applicable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

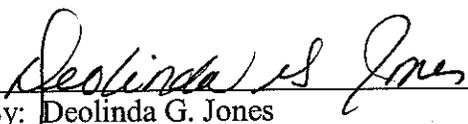
FOR DLCD AND THE LAND
CONSERVATION AND DEVELOPMENT
COMMISSION:


Lane Shetterly, Director
DLCD
Dated this 20th day of May, 2006.

FOR THE DEPARTMENT OF
ADMINISTRATIVE SERVICES:


Dugan Petty, Deputy Administrator
DAS, State Services Division
Dated this 20th day of May, 2006.

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


By: Deolinda G. Jones
State Right of Way Manager
Oregon Department of Transportation
Dated this 20th day of June, 2006

NOTICE OF RIGHT TO APPEAL OR OTHER JUDICIAL RELIEF

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

1. Judicial review under ORS 183.484: Judicial review under ORS 183.484 may be obtained by filing a petition for review within 60 days from the service of this order. A petition for judicial review under ORS 183.484 may be filed in the Circuit Court for Marion County or the Circuit Court in the county in which you reside.
2. A cause of action under ORS 197.352 (Measure 37 (2004)): If a land use regulation continues to apply to the subject property more than 180 days after the present owner of the property has made written demand for compensation under ORS 197.352¹, the present owner of the property, or any interest therein, shall have a cause of action in the circuit court in which the real property is located.

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

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.

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.”

ORS 197.352 (BALLOT MEASURE 37) CLAIM FOR COMPENSATION

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

June 20, 2006

STATE CLAIM NUMBER: M121774

NAMES OF CLAIMANTS: John and Rosemary Williams

MAILING ADDRESS: 21900 Rastovitch Road
Bend, Oregon 97702

PROPERTY IDENTIFICATION: Township 18S, Range 12E, Section 1
Tax lot 200
Deschutes County

OTHER CONTACT INFORMATION: Bruce White
PO Box 1278
Bend, Oregon 97709

DATE RECEIVED BY DAS: August 8, 2005

180-DAY DEADLINE: June 23, 2006¹

I. SUMMARY OF CLAIM

The claimants, John and Rosemary Williams, seek compensation in the amount of \$899,548 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 40-acre property into five parcels of approximately seven to eight acres each and to develop a dwelling on each parcel.² The subject property is located at 21900 Rastovitch Road, near Bend, in Deschutes County. (See claim.)

II. SUMMARY OF STAFF RECOMMENDATION

Based on the findings and conclusions set forth below, the Department of Land Conservation and Development (the department) has determined that the claim is valid. Department staff recommends that, in lieu of compensation, the requirements of the following state laws enforced by the Land Conservation and Development Commission (the Commission) or the department not apply to John and Rosemary Williams' division of the 40-acre property into five parcels of

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).

² The claim notes that an existing dwelling will be located on one of the proposed parcels.

approximately seven to eight acres each and to the 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. 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 Rosemary Williams acquired the property on May 16, 1966, and when John Williams acquired the property on April 13, 2004. The department acknowledges that the relief to which the John Williams is entitled under ORS 197.352 will not allow him to use the subject property in the manner set forth in the claim. (See the complete recommendation in Section VI. of this report.)

III. COMMENTS ON THE CLAIM

Comments Received

On September 19, 2005, pursuant to OAR 125-145-0080, the Oregon Department of Administrative Services (DAS) provided written notice to the owners of surrounding properties. According to DAS, one written comment was received in response to the 10-day notice.

The comment is relevant to whether the restriction of the claimants' use of the subject property reduces the fair market value of the property and whether a state agency can waive a state statute. The comment has been considered by the department in preparing this report. (See 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 August 8, 2005, for processing under OAR 125, division 145. The claim identifies the state and local Exclusive Farm Use (EFU) zone provisions as well as Goals 11 (Public Facilities and Services), 12 (Transportation) and 14 (Urbanization), ORS 92 and OAR 660, divisions 4, 11, and 12. 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

The claimants, John and Rosemary Williams, initially acquired the subject property on May 12, 1966, as reflected by deeds included with the claim. On April 21, 1997, the claimants conveyed the property to Rosemary Williams, as trustee of the Rosemary C. Williams Revocable Trust.³ Rosemary Williams, as trustee of the Rosemary C. Williams Revocable Trust, conveyed the property back to John and Rosemary Williams on April 13, 2004.⁴ A May 2, 2005, title report submitted with the claim establishes the claimants’ current ownership of the subject property.

Conclusions

The claimants, John and Rosemary Williams, are “owners” of the subject property as that term is defined by ORS 197.352(11)(C), as of April 13, 2004, and May 12, 1966, respectively. Rosemary Williams is a “family member” of John Williams as that term is defined by ORS 197.352(11)(A).

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 that the county’s adoption of Exclusive Farm Use (EFU) zoning, “in force since January 30, 1981, has severely restricted the development options of the property,” and the current EFU zoning “does not allow the claimants to further divide their property.” The claim also describes how certain state statutes, statewide land use planning goals and rules are alleged

³ Transfer of property to a revocable trust does not result in a change of ownership for the purposes of ORS 197.352.

⁴ Comments from the claimants’ attorney, concerning the acquisition date for John L. Williams, have been reviewed and the department considered that information in its final report.

to restrict the claimants' desired use of the property. Only state laws that are administered by the department are addressed in this report.⁵

The claim identifies the following state statutes, goals and rules as restricting the claimants' desired uses:

(a) ORS 215.263(1) and 215.780 and OAR 660-033-100. According to the claimants, these laws set minimum size requirements for land divisions in EFU zones that are or may be larger than the parcel sizes the claimants desire. ORS 215.263(1) requires that a land division in an EFU zone be reviewed by the county where the land is situated. Claimants have not described how this statute restricts their desired use of the property. ORS 215.780 contains minimum size requirements for land divisions in an EFU zone. Together with OAR 660-033-0100, these laws generally set a minimum land division size of 80 acres.

(b) ORS 215.263(5) and OAR 660-033-0100(11)(a). According to the claimants, this statute and rule set standards for land divisions for non-farm dwellings. The statute allows smaller land divisions for non-farm dwellings than would otherwise be allowed under ORS 215.780 under certain circumstances. The rule tracks the statute.

(c) ORS 215.283, 215.284 and 215.705 and OAR 660-033-130. According to the claimants, these statutes and this rule restrict the uses that are allowed in an EFU zone, and do not allow for single-family residences to be approved (unless shown to be in conjunction with various standards for dwellings in conjunction with farm use, as an accessory dwelling, as a non-farm dwelling or as a lot-of-record dwelling).

(d) Goal 14 and OAR 660-004-0040. According to the claimants, this goal and its implementing rule "precludes division of the subject property into lots of less than 10 acres in size." Goal 14 generally prohibits urban uses on lands outside of an urban growth boundary. However, the use the claimants desire, to divide the property into five lots of approximately seven to eight acres each, does not appear to be an urban use based on the record for this claim. As a result, Goal 14 does not apply. OAR 660-004-0040 does not apply to resource lands, including this property.

(e) Goal 11 and OAR 660-011-0065. According to the claimants, this goal and its implementing rule "precludes hooking up to or establishment of a public water supply system." Goal 11 and the implementing rule do not preclude hook up to or establishment of public water supply systems. Rather, they prohibit counties from allowing increased density, based on the availability of such a system. The goal and the rule do not restrict the claimants' desired use.

(f) Goal 12 and OAR 660-012-0020(3)(a)(B) and OAR 660-012-0060(1). Claimants provided no description or evidence of how this goal or the two cited rules restrict the claimants' desired use of the property.

(g) OAR 660-012-0065. According to claimants, this rule "limits establishment of new roads on Goal 3 lands." Claimants are correct to the extent that this rule limits certain types of transportation improvements on rural lands, including lands zoned EFU. However, it appears

⁵ The claim asserts that laws administered by the Oregon Department of Transportation (ODOT) also restrict the claimants' desired use of the property. Those laws are addressed in a separate report by ODOT.

that there is legal road access to claimants' property, and claimants' have not established how the cited rule restricts their desired use of the property (division and development of five homes).

(h) ORS 92.100(3). According to the claimants, this statute, to the extent that it would allow the county surveyor to make an independent assessment of whether a land division plat complies with the county's subdivision and zoning ordinances, restricts the claimants' desired use of the property. Even if that is the case, that requirement was in effect in 1966. ORS 92.100 (1965 edition) required that before any plat could be recorded, the county surveyor must approve it for, among other things, compliance with the subdivision requirements in effect in the area. ORS 92.100(2) (1965 edition). Claimants have not established that the current statute is more restrictive than the version in effect when they first acquired the property.

(i) ORS 92.010(15). According to the claimants, this statute makes the county's subdivision requirements applicable to the division of claimants' property. The statute simply defines the term "to subdivide land." Claimants have not established how this statute restricts their desired use of the property.

The claim is based generally on Deschutes County's current EFU zone and the applicable provisions of state law that require such zoning. The claimants' property is zoned EFU-TRB 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 3.⁶ Goal 3 became effective on January 25, 1975, and required that agricultural lands as defined by the goal be zoned EFU pursuant to ORS 215.

Current land use regulations, particularly ORS 215.263, 215.284 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.

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

OAR 660-033-0135 (applicable to farm dwellings) became effective on March 1, 1994, and interprets the statutory standard for a primary dwelling in an EFU zone under ORS 215.283(1)(f). OAR 660-033-0130(4) (applicable to non-farm dwellings) became effective on August 7, 1993, and was amended to comply with ORS 215.284(4) on March 1, 1994. 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.)

Claimant Rosemary Williams, a family member of claimant John Williams, first acquired the subject property on May 16, 1966, prior to the adoption of the statewide planning goals and their

⁶ The claimants' property is "agricultural land" because it contains predominantly Natural Resources Conservation Service Class I-VI soils.

implementing statutes and regulations. No county zoning applied to the subject property in 1966.

Conclusions

The current zoning requirements, minimum lot size and dwelling standards established by applicable provisions of Goal 3, ORS 215 and OAR 660, division 33, were all enacted or adopted after claimant Rosemary Williams acquired the subject property and do not allow the desired division or residential development of the property. These laws restrict the use of the subject property relative to the uses allowed when Rosemary Williams acquired the property.

3. Effect of Regulations on Fair Market Value

In order to establish a valid claim, ORS 197.352(1) requires that the land use regulations (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 \$899,548 as the reduction in the subject property’s fair market value due to the regulations. This amount is based on “the current market value of the subject property, as established in the Assessor’s records compared to the value of 5-acre lots immediately next door, as established from the Assessor’s records.”

Conclusions

As explained in Section V.(1) of this report, the claimants are John and Rosemary Williams. Rosemary Williams, a family member of John Williams, first acquired the subject property on May 16, 1966. Under ORS 197.352, the claimants are due compensation for land use regulations that restrict the use of the subject property and have the effect of reducing 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 subject property restrict the desired use of the property. The claimants estimate that the effect of the regulations on the fair market value of the property is a reduction of \$899,548.

Without an appraisal or other documentation, it is not possible to substantiate the dollar amount by which the land use regulations have reduced the fair market value of the subject property. Nevertheless, based on the submitted information, the department determines 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 since Rosemary Williams acquired the property.

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 applicable provisions of Goal 3, ORS 215 and OAR 660, division 33, which Deschutes County has implemented through its current EFU-TRB zone. The claim also identifies several statutes in ORS 92. With the exception of the statutes in ORS 92, all of these land use regulations were enacted or adopted after Rosemary Williams acquired the subject property.

ORS 92.010(15), the definition of the phrase “to subdivide property,” and ORS 92.100(3) were both enacted before 1966. As a result, these statutes, to the extent that they are “land use regulations,” are exempt under ORS 197.352(3)(E).

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 statutory, goal and rule restrictions on division and development of the claimants’ property were in effect when Rosemary Williams acquired it in 1966. As a result, these laws are not exempt under ORS 197.352(3)(E).

Laws in effect when Rosemary Williams acquired the subject property (including the statutes in ORS 92 described above) are exempt under ORS 197.352(3)(E), and will continue to apply to the claimants’ use of the property. There may be other laws that continue to apply to the claimants’ use of the subject property that have not been identified in the claim. In some cases, it will not be possible to know which laws apply to a use of 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).

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 the claim, the greater the possibility that there may be additional laws that will later be determined to continue to apply to their use of the subject property.

VI. FORM OF RELIEF

ORS 197.352(1) provides for payment of compensation to an owner of private real property if the Commission or the department has enforced laws that restrict the use of the subject 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 subject property permitted at the time the present 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' desired use of the subject property. The claim asserts that existing state land use regulations enforced by the Commission or the department have the effect of reducing the fair market value of the subject property by \$899,548. However, because the claim does not provide an appraisal or other relevant evidence demonstrating the amount by which the land use regulations described in Section V.(2) 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 has determined that the state 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 John and Rosemary Williams to use the subject property for a use permitted at the time they each acquired the property on April 13, 2004, and May 12, 1966, respectively.

Claimant Rosemary Williams acquired the subject property on May 16, 1966, prior to the adoption of the statewide planning goals and related statutes and regulations. No county zoning applied to the subject property in 1966.

At the time claimant John Williams reacquired an interest in the subject property on April 13, 2004, it was zoned EFU-TRB by Deschutes County and subject to the current lot size and dwelling standards under Goal 3, ORS 215 and OAR 660, division 33, as well as the other state statutes, statewide planning goals and rules described in Section V.(2) of this report.

In addition to the applicable provisions of Goal 3 and ORS 215 in effect on April 13, 2004, and other laws in effect when John Williams acquired the subject property, there are other laws that apply to John Williams' 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 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, and depending on when they were enacted or adopted, may continue to apply to the claimants' 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 subject property on that basis.

Conclusions

Based on the record, the department recommends that the claim be approved, subject to the following terms:

1. In lieu of compensation under ORS 197.352, the State of Oregon will not apply the following laws to Rosemary Williams' division of the 40-acre property into five parcels of approximately seven to eight acres each and to her development of a dwelling on each parcel: applicable provisions of Goal 3, ORS 215 and OAR 660, division 33. These land use regulations will not apply only to the extent necessary to allow Rosemary Williams to use the subject property for the

use described in this report, and only to the extent that use was permitted when she acquired the property on May 16, 1966.

In lieu of compensation under ORS 197.352, the State of Oregon will not apply the following laws to John Williams' division of the 40-acre property into five parcels of approximately seven to eight acres each and to his development a dwelling on each parcel: applicable provisions of Goal 3, ORS 215 and OAR 660, division 33, enacted or adopted after April 13, 2004. These land use regulations will not apply only to the extent necessary to allow John Williams to use the subject property for the use described in this report, and only to the extent that use was permitted when he acquired the property on April 13, 2004. The department acknowledges that the relief to which John Williams is entitled under ORS 197.352 will not allow him to use the subject property in the manner set forth in the claim.

2. The action by the State of Oregon provides the state's authorization to the claimants to use the subject property for the use described in this report, subject to the standards in effect on May 16, 1966, for Rosemary Williams, and subject to the standards in effect on April 13, 2004, for John Williams. On April 13, 2004, the property was subject to applicable provisions of Goal 3, ORS 215 and ORS 660, division 33, currently 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 31, 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

Final Staff Report and Recommendation

June 20, 2006

STATE CLAIM NUMBER: M121774

NAME OF CLAIMANT: Rosemary C. and John L. Williams

IDENTIFICATION OF PROPERTY: Township 18S, Range 12E, Section 01
Tax lot 200
Deschutes County

OTHER CONTACT INFO: Bruce W. White
Attorney at Law
P.O. Box 1278
Bend, OR 97709

DATE RECEIVED BY DAS: August 8, 2005

180-DAY DEADLINE: June 23, 2006¹

I. CLAIM

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

II. SUMMARY OF STAFF RECOMMENDATION

Based on the findings and conclusions set forth below, the Department of Transportation (the department) has determined that the claim is not valid. The department has determined that the claim does not identify a state land use regulation that the department has enforced since December 2, 2004 in a manner that restricts the claimants' right to divide the property into five residential lots ranging in size from 7 to 8 acres each with one dwelling, or that has the effect of reducing the fair market value of the claimant's property.

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).

III. COMMENTS ON THE CLAIM

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

IV. TIMELINESS OF CLAIM

Requirement

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

Findings of Fact

The claim submitted August 8, 2005, identifies a single “regulation” administered by the Oregon Department of Transportation. There is no description in the claim concerning how the listed regulation has been enforced since December 2, 2004, or how it restricts the use of the property that the claimant wishes to carry out. The regulation identified in the claim is the Oregon Highway Plan, specifically, mobility standards and policies implemented by mobility standards. Only laws that were enacted prior to December 2, 2004, the effective date of Measure 37 are the basis for this claim. (See citations of statutory and administrative rule history of the Oregon Revised Statutes and Oregon Administrative Rules.)

Conclusions

The claim has been submitted within two years of December 2, 2004, the effective date of Measure 37, based on land use regulations adopted prior to December 2, 2004, and is therefore timely filed.

V. ANALYSIS OF CLAIM

1. Ownership

ORS 197.352 provides for payment of compensation or relief from specific laws for “owners” as that term is defined in ORS 197.352. ORS 197.352(11)(C) defines “owner” as “the present owner of the property, or any interest therein.”

Findings of Fact

The findings of the 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 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 in relevant part that:

“Claimants seek to have the county and state to exercise their respective options to ‘repeal, modify, or not apply’ the current restrictive zoning to allow Claimants to split the property into five legal lots of record... of approximately 8 acres each, including one lot that would contain the existing dwelling.”

The claim further states that:

“When the Claimants purchased the property in 1966, there was either no zoning on the property or zoning that did not preclude division of the property into lots as small as 7 or 8 acres.”

In the claim submitted to DAS, the claimants cite several sections of Oregon Administrative Rules and Oregon Revised Statutes, none of which are administered by the Oregon Department of Transportation, however, included in the list is a reference to:

Oregon Highway Plan, mobility standards and policies implemented by mobility standards

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 claimant’s use of the 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).

The Oregon Highway Plan is not a “land use regulation.” That term is defined in subsection ORS 197.352(11)(B). The only state administrative rules that are “land use regulations” are rules of the Land Conservation and Development Commission, or rules regulating farming and forest practices. The Oregon Highway Plan is neither. Additionally, it is not a land use regulation because it generally regulates the use of *state highways*, not the use of private real property.

In addition, because the property neither abuts nor has direct access to a state highway, the Oregon Highway Plan would likely not apply to the claimants’ desired use of the property.²

Finally, the department has taken no action since the effective date of ORS 197.352 to enforce the Oregon Highway Plan with respect to claimants or claimants’ property.

Conclusions

The claimants have not established that any “land use regulation” administered by the department restricts the claimants’ desired use of the property, or that any “land use regulation” administered by the department has been enforced to restrict the claimants’ use of the property since the effective date of ORS 197.352. Based on the information in the record, the department has no basis for determining that any law listed in the claim is a state “land use regulation.” Until the claimants seek some particular action from the department, the department is unable to determine whether the Oregon Highway Plan may apply to the property. As a result, the claimants have failed to identify a state land use regulation that has been enforced as to the claimants’ desired use of their property in a manner that restricts its use. Since December 2, 2004, the department has not enforced a land use regulation that restricts the claimants’ right to divide the property into five residential lots ranging in size from 7 to 8 acres each with one dwelling.

² The closest state highway is U.S. 20, which is nearly a mile away. Under the Highway Classification System contained in the Oregon Highway Plan, to which the mobility standards are tied, U.S. 20 is a Statewide Highway and this particular segment is also an Expressway and Freight Route. Even *if* the Oregon Highway Plan were to be considered a land use regulation, the stated management objective for this highway classification “is to provide safe and efficient, high-speed continuous-flow operation” and, as such, would restrict or prohibit activities, to the extent that it does at all, for the protection of public health and safety pursuant to ORS 197.352(3)(B).

3. Effect of Regulations on Fair Market Value

In order to establish a valid claim, ORS 197.352(1) requires that any laws described in Section V.2 of this report must have “the effect of reducing the fair market value of the property, or any interest therein.”

Findings of Fact

The claim asserts an estimated reduction in value of \$899,548.00 resulting from enactment or enforcement of land use regulations.³ The claim does not include an appraisal or other analyses to support the claimants’ estimates, nor does it define what portion, if any, of the alleged reduction in value is attributed to “land use regulations” administered by the department as opposed to other land use regulations.

Conclusions

To state a claim under ORS 197.352(1), claimants must allege some reduction in fair market value of their property, allegedly caused by a land use regulation which 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. In addition, under ORS 197.352(3), certain types of laws are exempt from ORS 197.352.

Findings of Fact

As explained in Section V.(2)⁴ of this report, the claimants, John and Rosemary Williams, have not established that any state laws administered by the Oregon Department of Transportation restrict the use of the subject property in a manner that reduces the fair market value of the property.

Conclusions

The department concludes that based on the information in its record, at this point in time the claimant has failed to identify a state land use regulation that is administered by the

³ This value is derived by averaging the assessed value of three adjacent subdivision lots to arrive at a per acre value, multiplying that by the total number of proposed acres of the five parcels claimants wish to create, and subtracting the property’s current assessed value.

⁴ See footnote 2.

department and that restricts the claimants' use of their property and that is not exempt under ORS 197.352. As a result, the claim must be denied as to laws administered by the Oregon Department of Transportation.

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 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, no state land use regulations enforced by the department restrict the claimants' use of the property in a manner that reduces the fair market value of the property and that involve a law that is not exempt.

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 of Transportation. 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 June 5, 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.