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

IN THE MATTER OF THE CLAIM FOR COMPENSATION UNDER ORS 197.352 (BALLOT MEASURE 37) OF Nancy Lamka, CLAIMANT	))))	FINAL ORDER CLAIM NO. M122687

Claimant: Nancy Lamka (the Claimant)

Property: Township 01N, Range 01W, Section 07C, Tax lots 102, 106, 107 and 113, Washington County (the Property)

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

Claimant 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 Nancy Lamka's division of tax lots 102, 106 and 107 for residential development: applicable provisions of Goal 14 and OAR 660-004-0040. These land use regulations will not apply to the claimant only to the extent necessary to allow her to use tax lots 102, 106, and 107 for the use described in this report, and only to the extent that use was permitted when she acquired these tax lots on September 22, 1967.

2. The action by the State of Oregon provides the state's authorization to the claimant to use tax lots 102, 106, and 107 for the use described in this report, subject to the standards in effect on September 22, 1967.

3. To the extent that any law, order, deed, agreement or other legally enforceable public or private requirement provides that tax lots 102, 106, and 107 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 claimant first obtains that permit, license or other form of authorization or consent. Such requirements may include, but are not limited to: a building permit, a land use

decision, a "permit" as defined in ORS 215.402 or 227.160, other permits or authorizations from local, state or federal agencies and restrictions on the use of the tax lots imposed by private parties.

4. Any use of tax lots 102, 106, and 107 by the claimant 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 claimant to use tax lots 102, 106, and 107, it may be necessary for her 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 tax lots. Nothing in this order relieves the claimant 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 tax lots 102, 106 and 107 by the claimant.

This Order is entered by the Deputy 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

Cora R Parker

Cora R. Parker, Deputy Director
DLCD
Dated this 14th day of August, 2006.

FOR the DEPARTMENT OF ADMINISTRATIVE SERVICES:

Dugan Petty

Dugan Petty, Deputy Administrator
DAS, State Services Division
Dated this 14th day of August, 2006.

NOTICE OF RIGHT TO APPEAL OR OTHER JUDICIAL RELIEF

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

1. Judicial review under ORS 183.484: Judicial review under ORS 183.484 may be obtained by filing a petition for review within 60 days from the service of this order. A petition for judicial review under ORS 183.484 may be filed in the Circuit Court for Marion County or the Circuit Court in the county in which you reside.

2. A cause of action under ORS 197.352 (Measure 37 (2004)): If a land use regulation continues to apply to the subject property more than 180 days after the present owner of the property has made written demand for compensation under ORS 197.352[1], the present owner of the property, or any interest therein, shall have a cause of action in the circuit court in which the real property is located.

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

FOR INFORMATION ONLY

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

[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

August 14, 2006

STATE CLAIM NUMBER:	M122687
NAME OF CLAIMANT:	Nancy Lamka
MAILING ADDRESS:	18335 Northwest West Union Road Suite C #331 Portland, Oregon 97229
PROPERTY IDENTIFICATION:	Township 01N, Range 01W, Section 07C Tax lots 102, 106, 107 and 113 Washington County
DATE RECEIVED BY DAS:	October 6, 2005
180-DAY DEADLINE:	August 21, 2006[1]

I. SUMMARY OF CLAIM

The claimant, Nancy Lamka, seeks compensation in the amount of $30 million 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 claimant desires compensation or the right to divide each of the following tax lots for residential development: tax lot 102, 1.98 acres; tax lot 106, 2.0 acres; tax lot 107, 5.18 acres; and tax lot 113, 2.45 acres. The subject property is located at the geographic coordinates listed above, near Portland, in Washington 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 in part. 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 Nancy Lamka's division of subject tax lots 102, 106 and 107 for residential development: applicable provisions of Statewide Planning Goal 14 (Urbanization) and Oregon Administrative Rule (OAR) 660-004-0040. These land use regulations will not apply to the claimant only to the extent necessary to allow her to use tax lots 102, 106 and 107 for the use

[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. Srvcs.*, 340 Or 117 (2006).

described in this report, and only to the extent that use was permitted when she acquired these tax lots on September 22, 1967.

The department further finds that the claim is not valid for tax lot 113 because the claimant's desired division of the property was prohibited by the laws in effect when she acquired this tax lot on March 30, 1987. (See the complete recommendation in Section VI. of this report.)

III. COMMENTS ON THE CLAIM

Comments Received

On October 14, 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, two written comments 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 October 6, 2005, for processing under OAR 125, division 145. The claim identifies OAR 660-004-0040 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

The claimant, Nancy Lamka, acquired tax lots 102, 106 and 107 on September 22, 1967, as reflected by a contract of sale included with the claim. The claimant acquired tax lot 113 on March 30, 1987, as reflected by a deed provided by the Washington County Assessor's Office.[2] The Washington County Assessor's Office confirms the claimant's current ownership of the subject property.

Conclusions

The claimant, Nancy Lamka, is an "owner" of the subject property as that term is defined by ORS 197.352(11)(C), as of September 22, 1967, for tax lots 102, 106 and 107 and as of March 30, 1987, for tax lot 113.

2. The Laws That are the Basis for This Claim

In order to establish a valid claim, ORS 197.352(1) requires, in part, that a law must restrict the claimant's use of private real property in a manner that reduces the fair market value of the property relative to how the property could have been used at the time the claimant acquired the property.

Findings of Fact

The claim indicates that the claimant desires to divide each of the subject tax lots for residential development. The claim identifies OAR 660-004-0040 as restricting the desired use.

The claim is based generally on the applicable provisions of state law that require rural residential zoning. The property is zoned by Washington County as AF-10, which requires that new lots or parcels be a minimum of 10 acres. The AF-10 zone is a rural residential zone

[2] The claimant also acquired tax lot 113 on September 22, 1967. The claimant sold tax lot 113 on April 16, 1974, as reflected by a warranty deed provided by the Washington County Assessor's Office and reacquired it on March 30, 1987.

consistent with 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 general, as adopted, Goal 14 required that the size of lots or parcels in rural residential zones be a minimum of two acres.

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 if a county rural residential zone in effect on October 4, 2000, specifies a minimum lot size of two acres or more, the area of any new lot or parcel shall equal or exceed the minimum lot size that is already in effect on that date (OAR 660-004-0040(7)(c)). Some relief from this provision is available for lots or parcels having more than one permanent habitable dwelling pursuant to OAR 660-004-0040(7)(h). The rule also provides that a county's minimum lot size requirement in a rural residential zone shall not be amended to allow a smaller minimum lot size without approval of an exception to Goal 14 (OAR 660-004-0040(6)). Because Washington County's AF-10 zone was in effect on October 4, 2000, and requires a minimum lot size of 10 acres, the minimum lot size for any new lot or parcel must equal or exceed 10 acres.

The claimant acquired tax lots 102, 106 and 107 on September 22, 1967, prior to the adoption of the statewide planning goals and their implementing statutes and rules. When the claimant acquired tax lot 113 on March 30, 1987, it was subject to Washington County's acknowledged comprehensive plan. At that time, tax lot 113 was zoned by Washington County as AF-10, which established a 10-acre minimum for new lots or parcels. Division of the subject property would have been subject to the county's acknowledged AF-10 zone, and the provisions of Goal 14 then in effect, which absent the county's greater restrictions, generally required that the size of lots or parcels in rural residential zones be a minimum of two acres.

Conclusions

The minimum lot size requirements for rural residential lots or parcels established by OAR 660-004-0040 were adopted since the claimant acquired each of the subject tax lots and do not allow the desired division of the tax lots. However, when the claimant acquired tax lot 113 in 1987, the minimum lot size requirements for rural residential lots or parcels established by Goal 14, as implemented by the county's acknowledged AF-10 zone, prohibited the division of tax lot 113 into lots or parcels of less than two acres, as the claimant desires. Accordingly, the claimant's division of tax lot 113, which consists of 2.45 acres, would not have been permitted at the time she acquired this tax lot.

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 claimant has identified. There may be other laws that currently apply to the claimant's use of the subject property, and that may continue to apply to the claimant's use of the property, that have not been identified in the claim.

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

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 claimant seeks 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 the land use regulation(s) (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 $30 million as the reduction in the subject property's fair market value due to the regulations that restrict the claimant's desired use of the property. This amount is based on the claimant's assessment of the subject property's value.

Conclusions

As explained in Section V.(1) of this report, the claimant is Nancy Lamka who acquired the subject tax lots on September 22, 1967, and March 30, 1987. Under ORS 197.352, the claimant is 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 adopted since the claimant acquired tax lots 102, 106 and 107 restrict the claimant's desired use of these tax lots. The claimant estimates that the effect of the regulations on the fair market value of the subject property is a reduction of $30 million.

Without an appraisal or other documentation, it is not possible to substantiate the specific dollar amount by which the land use regulations have reduced the fair market value of the property. Nevertheless, based on the evidence in the record for this claim, 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.

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 Washington County has implemented through its AF-10 zone. With the exception of provisions of Goal 14 in effect when the claimant acquired tax lot 113 on March 30, 1987, these land use regulations were adopted after the claimant 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 Goal 14 in effect when the claimant acquired tax lot 113, the general goal and rule restrictions on residential division of the claimant's property are not exempt under ORS 197.352(3)(E). Provisions of Goal 14 in effect when the claimant acquired tax lot 113 in 1987 are exempt under ORS 197.352(3)(E) and will continue to apply to this tax lot.

Other laws in effect when the claimant acquired the subject property are exempt under ORS 197.352(3)(E) and will continue to apply to the claimant's use of the property. There may be other laws that continue to apply to the claimant's 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 claimant seeks 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 uses that the claimant has 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 claimant should be aware that the less information she has provided to the department in her claim, the greater the possibility that there may be additional laws that will later be determined to continue to apply to her 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 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 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 claimant's 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 $30 million. However, because the claim does not provide an appraisal or other relevant evidence demonstrating that the regulations described in Section V.(2) reduce the fair market value of the subject property, a

specific amount of compensation cannot be determined. In order to determine a specific amount of compensation due claim, it would also be necessary to verify whether or the extent to which the claimant's desired use of the property was allowed under the standards in effect when she acquired the property. Nevertheless, based on the record for this claim, the department has determined that the laws on which the claim is based have reduced the fair market value of tax lots 102, 106 and 107 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 Nancy Lamka to use tax lots 102, 106 and 107 for a use permitted at the time she acquired these tax lots on September 22, 1967.

Conclusions

Based on the record, the department recommends that the claim be denied as to tax lot 113 because the claimant's desired division of the tax lot was prohibited by the provisions of Goal 14, as implemented through Washington County's acknowledged AF-10 zone, in effect when she acquired this tax lot on March 30, 1987. The department otherwise 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 Nancy Lamka's division of tax lots 102, 106 and 107 for residential development: applicable provisions of Goal 14 and OAR 660-004-0040. These land use regulations will not apply to the claimant only to the extent necessary to allow her to use tax lots 102, 106, and 107 for the use described in this report, and only to the extent that use was permitted when she acquired these tax lots on September 22, 1967.

2. The action by the State of Oregon provides the state's authorization to the claimant to use tax lots 102, 106, and 107 for the use described in this report, subject to the standards in effect on September 22, 1967.

3. To the extent that any law, order, deed, agreement or other legally enforceable public or private requirement provides that tax lots 102, 106, and 107 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 claimant first obtains that permit, license or other form of authorization or consent. Such requirements may include, but are not limited to: a building permit, a land use decision, a "permit" as defined in ORS 215.402 or 227.160, other permits or authorizations from local, state or federal agencies and restrictions on the use of the tax lots imposed by private parties.

4. Any use of tax lots 102, 106, and 107 by the claimant 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 claimant to use tax lots 102, 106, and 107, it may be necessary for her 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 tax lots. Nothing in this order relieves the claimant 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 tax lots 102, 106 and 107 by the claimant.

VII. COMMENTS ON THE DRAFT STAFF REPORT

The department issued its draft staff report on this claim on July 31, 2006. OAR 125-145-0100(3), provided an opportunity for the claimant or the claimant's authorized agent and any third parties who submitted comments under OAR 125-145-0080 to submit written comments, evidence and information in response to the draft staff report and recommendation. Comments received have been taken into account by the department in the issuance of this final report.