

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. M129374
(BALLOT MEASURE 37) OF)
Carl R. and Mary E. Wallace, CLAIMANTS)

Claimants: Carl R. and Mary E. Wallace (the Claimants)

Property: Township 18S, Range 12E, Section 1A, Tax lots 300 and 301
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 Reports and Recommendation of DLCD (the DLCD Report), and the 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 Department of Transportation 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 Carl and Mary Wallace's division of the 25.82-acre subject property into lots of 0.5 to 3.2 acres and to their development of a single-family dwelling on each lot: applicable provisions of Goal 14 and OAR 660-004-0040. These land use regulations will not apply to the claimants' use of the subject property only to the extent necessary to allow them to use the property for the use described in this report, and only to the extent that use was permitted when they acquired the property on January 26, 1971.
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 January 26, 1971.
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 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.

This Order is entered by the Department of Transportation as a final order under ORS 197.352 and OAR Chapter 125, division 145.

FOR DLCD AND THE LAND
CONSERVATION AND DEVELOPMENT
COMMISSION:

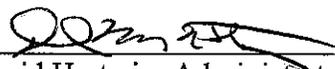
Lane Shetterly, Director



Cora R. Parker, Deputy Director
DLCD

Dated this 16th day of November, 2006.

FOR THE DEPARTMENT OF
ADMINISTRATIVE SERVICES:

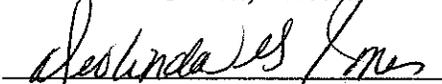


David Hartwig, Administrator
DAS, State Services Division

Dated this 16th day of November, 2006.

FOR THE FOR DEPARTMENT OF
TRANSPORTATION:

Matthew L. Garrett, Director



By: Deolinda G. Jones

State Right of Way Manager

Oregon Department of Transportation

Dated this 16th day of November, 2006.

NOTICE OF RIGHT TO APPEAL OR OTHER JUDICIAL RELIEF

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

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

ORS 197.352 (BALLOT MEASURE 37) CLAIM FOR COMPENSATION

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

November 16, 2006

STATE CLAIM NUMBER: M129374

NAMES OF CLAIMANTS: Carl R. and Mary E. Wallace

MAILING ADDRESS: 21825 Bear Creek Road
Bend, Oregon 97701

PROPERTY IDENTIFICATION: Parcel 1 and parcel 2 of Deschutes County
Partition Plan No. 2001-21.
Also known as Township 18S, Range 12E,
Section 1A
Tax lots 300 and 301
Deschutes County

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

DATE RECEIVED BY DAS: May 22, 2006

180-DAY DEADLINE: November 18, 2006

I. SUMMARY OF CLAIM

The claimants, Carl and Mary Wallace, seek compensation in the amount of \$1.5 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 claimants desire compensation or the right to divide the 25.82-acre subject property into lots of 0.5 to 3.2 acres and to develop a single-family residence on each lot. The subject property consists of tax lots 300 and 301 and is located at 21825 and 21845 Bear Creek 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 Carl and Mary Wallace's division of the 25.82-acre subject property into lots of 0.5 to 3.2 acres or to their development of a single-family residence on each lot: 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 claimants' use of the subject property only to the extent necessary to allow them to use the property for the use described in this report, and only to the extent that use was permitted when they acquired the property in 1971. (See the complete recommendation in Section VI. of this report.)

III. COMMENTS ON THE CLAIM

Comments Received

On September 12, 2006, 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 does not address whether the claim meets the criteria for relief under ORS 197.352. Comments concerning the effects a use of the subject property may have on surrounding areas are generally not something that the department is able to consider in determining whether to waive a state law. If funds do become available to pay compensation, then such effects may become relevant in determining which claims to pay compensation for instead of waive a state law. (See the comment letter in the department's claim file.)

IV. TIMELINESS OF CLAIM

Requirement

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

1. For claims arising from land use regulations enacted prior to the effective date of Measure 37 (December 2, 2004), within two years of that effective date, or the date the public entity applies the land use regulation as an approval criteria to an application submitted by the owner, whichever is later; or
2. For claims arising from land use regulations enacted after the effective date of Measure 37 (December 2, 2004), within two years of the enactment of the land use regulation, or the date the owner of the property submits a land use application in which the land use regulation is an approval criteria, whichever is later.

Findings of Fact

This claim was submitted to DAS on May 22, 2006, for processing under OAR 125, division 145. The claimant identifies the following as the basis of the claim: Statewide Planning Goals 11 (Public Facilities and Services), 12 (Transportation) and 14; Oregon Highway Plan mobility standards;¹ OAR 660-004-0040, 660-011-0065 and 660-012-0065; and any state laws precluding division of the subject property into lots as small as one-half acre. Only laws that were enacted or adopted prior to December 2, 2004, are the basis for this claim.

¹ The mobility standards of the Oregon Highway Plan are addressed in a separate report for this claim by the Oregon Department of Transportation.

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, Carl and Mary Wallace, acquired the subject property on June 26, 1971, as reflected by a warranty deed included with the claim. The claimants’ parents, Thomas and Thelma Wallace, acquired the subject property on April 20, 1963, as reflected by the deeds included with the claim. The Deschutes County Assessor’s Office confirms the claimants’ current ownership of the subject property.

Conclusions

The claimants, Carl and Mary Wallace, are “owners” of the subject property as that term is defined by ORS 197.352(11)(C), as of June 26, 1971. The claimants’ parents, Thomas and Thelma Wallace, are “family members” as defined by ORS 197.352(11)(A) and acquired the subject property on April 20, 1963.

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 claimants’ desire to divide the 25.82-acre subject property into lots of 0.5 to 3.2 acres and to develop a single-family residence on each lot. It indicates that certain state land use regulations restrict the claimants’ desired use.

The claim is based primarily on the provisions of state law that require rural levels of use of the subject property. The claimants’ property is zoned Multiple Use Agriculture (MUA-10) by Deschutes County. MUA-10 is a rural zone, 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 2000, as a result of a 1986 Oregon Supreme Court decision,² the Commission amended Goal 14 and adopted OAR 660-004-0040 (Application of Goal 14 to Rural Residential Areas), which was effective on October 4, 2000. The rule 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 (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 Deschutes County's MUA-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. This prevents the claimants' desired use of the property.

Goal 11, which became effective on January 25, 1975, generally prohibits urban levels of public facilities and services on lands that are outside an urban growth boundary. Goal 11 has two components. The first component restricts an owner's use of land outside of an urban growth boundary by prohibiting the owner from utilizing urban levels of services or facilities. The second component restricts providers from extending urban facilities to serve property outside an urban growth boundary.³ The claim also identifies OAR 660-011-0065 as restricting the claimants' desired use of the property by precluding the hook up of new dwellings to a public water system. The rule prohibits the extension or establishment of sewer systems but does not directly address water systems.

The claim also lists OAR 660-012-0065 and Goal 12 as restricting the claimants' desired use of the property by potentially limiting the density of residential development of the property. OAR 660-012-0065 identifies transportation facilities, services and improvements, which may be permitted on rural lands consistent with Goals 3 (Agricultural Lands), 4 (Forest Lands), 11 and 14 without a goal exception. A goal exception may be required if Goal 14 were to apply to the claimants' desired use. However, as this reports determines that Goal 14 should not apply to the claimants' desired use, this rule would no longer apply to or restrict the claimants' desired use. The claim does not establish that Goal 12, by itself, restricts the claimants' desired use.

The claimants' family acquired the subject property in 1963, prior to the adoption of Goal 14 and OAR 660-004-0040. At that time, the property was not zoned by Deschutes County.

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

³ The claim states that Goal 11 and OAR 660-011-0065 "arguably precludes hooking up to public water system" but does not show how these state regulations restrict the use of the property in a manner that reduces the fair market value of the property. Goal 11 applies to both the use of property and to any action of a district proposing to serve the subject property. ORS 197.250.

Conclusions

The minimum lot size requirements for rural residential lots or parcels established by Goal 14 and OAR 660-004-0040 were adopted since the claimants family acquired the subject property in 1963 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 uses that the claimants have identified. There may be other laws that currently apply to the claimants' use of the subject property, and that may continue to apply to the claimants' use of the property, that have not been identified in the claim. In some cases, it will not be possible to know which laws apply to a use of 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.

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 \$1.5 million as the reduction in the subject property's fair market value due to the regulations that restrict the claimants' desired use of the property. This amount is based on the assessed value of the subject property compared to existing lots in the immediate area that are similar to the parcels the claimants seek to create under this claim.

Conclusions

As explained in Section V.(1) of this report, the claimants are Carl and Mary Wallace whose family acquired the subject property in 1963. 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' family acquired the subject property restrict the claimants' desired use of the property. The claimants estimate that the effect of the regulations on the fair market value of the subject property is a reduction of \$1.5 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 subject 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 Deschutes County has implemented through its MUA-10 zone. Both of these land use regulations were adopted after the claimants' family acquired the subject property in 1963.

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 division of rural residential land were in effect when the claimants' family acquired the subject property in 1963. As a result, these laws are not exempt under ORS 197.352(3)(E).

Laws in effect when the claimants' family acquired the subject property are exempt under ORS 197.352(3)(E) and will continue to apply to the claimants' use of the property. There may be other laws that continue to apply to the claimants' use of the subject property that have not been identified in the claim. In some cases, it will not be possible to know which laws apply to a use of the subject property until there is a specific proposal for that use. When the claimants seek a building or development permit to carry out a specific use, it may become evident that other state laws apply to that use. In some cases, some of these laws may be exempt under ORS 197.352(3)(A) to (D).

This report addresses only those state laws that are identified in the claim, or that the department is certain apply to the subject property based on the uses that the claimants have identified. Similarly, this report only addresses the exemptions provided for under ORS 197.352(3) that are clearly applicable, given the information provided to the department in the claim. 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.

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 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 \$1.5 million. However, because the claim does not provide an appraisal or other relevant evidence demonstrating that 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. In order to determine a specific amount of compensation due for this claim, it would also be necessary to verify whether or the extent to which the claimants' desired use of the property was allowed under the standards in effect when their family 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 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 Carl and Mary Wallace to use the subject property for a use permitted at the time they acquired the property on June 26, 1971.

The claimants acquired the subject property on January 26, 1971. According to the claim, at that time, the claimants would have been subject to a subdivision ordinance (PL-2) and a comprehensive plan (adopted on June 17, 1970) referred to as the "Comprehensive Plan to 1990," which when read together, indicate a minimum lot size of one-half acre for purposes of subdividing the property.

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 Carl and Mary Wallace's division of the 25.82-acre subject property into lots of 0.5 to 3.2 acres and to their development of a single-family dwelling on each lot: applicable provisions of Goal 14 and OAR 660-004-0040. These land use regulations will not apply to the claimants' use of the subject property only to the extent necessary to allow them to use the property for the use described in this report, and only to the extent that use was permitted when they acquired the property on January 26, 1971.
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 January 26, 1971.
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 October 23, 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. No comments were received.

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

OREGON DEPARTMENT OF TRANSPORTATION

Final Staff Report and Recommendation

November 16, 2006

STATE CLAIM NUMBER: M129374

NAME OF CLAIMANT: Carl E. Wallace and
Mary E. Wallace

IDENTIFICATION OF PROPERTY: Parcel 1 and parcel 2 of Deschutes County
Partition Plan No. 2001-21.
Also known as: Township 18S, Range 12E,
Section 1
Tax lots 300 & 301
Deschutes County

OTHER CONTACT INFO: Bruce White, Attorney at Law
PO Box 1278
Bend, OR 97709

DATE RECEIVED BY DAS: May 22, 2006

180-DAY DEADLINE: November 18, 2006

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 establish that the Oregon Highway Plan mobility standards have been enforced with respect to the property since December 2, 2004, or that such standards are state "land use regulations," or that even if they are state "land use regulations" that they restrict the claimants' desired use of the property or have had the effect of reducing the fair market value of the claimants' property, or that the mobility standards are not exempt under ORS 197.352(3)(B).

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 regulations relevant to ODOT identified in the claim are: the Oregon Highway Plan mobility standards. It appears that the claim concerns only aspects of the Oregon Highway Plan that were adopted prior to December 2, 2004, the effective date of Measure 37.

Conclusions

The claim has been submitted within two years of December 2, 2004, the effective date of Measure 37, based on aspects of the Oregon Highway Plan 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 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 states in relevant part:

Claimants seek relief from ... the applicability of the 1999 Oregon Highway Plan, as amended, (OHP) to the extent that the OHP mobility standards could be used as a performance standard for approval of the proposed subdivision. The claimants seek relief from any mobility standards (and any OHP policies that the mobility standards are intended to implement) set forth in the OHP related to intersections with any transportation facilities under the jurisdiction of ODOT.

Claimants’ desired use is to divide the property into lots of between 3.4 acres to 0.5 acres each, and to develop a single family residence on each lot.

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).

Neither the Oregon Highway Plan nor the mobility standards are state “land use regulations.” 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, and administrative rules regulating farming and forest practices. The Highway Plan and mobility standards are not part of those.

Under ORS 197.352, state *statutes* restricting the use of land are “land use regulations”, however, the claimants have not cited any statutes administered by ODOT.

The Oregon Highway Plan and mobility standards are not land use regulations¹ because they generally regulate the use of *state highways*, not the use of private real property.

¹ See also Section V.4. Exemptions Under ORS 197.352(3) *infra*.

Finally, ODOT has taken no action since the effective date of ORS 197.352 to enforce any of the listed standards with respect to claimants' property.

Conclusions

The claimants have not established that any "land use regulation" administered by ODOT restricts the claimants' desired use of the property, or that any "land use regulation" administered by ODOT 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, ODOT 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 ODOT, ODOT is unable to determine how the cited standards 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' use of their property in a manner that restricts its use. Since December 2, 2004, ODOT has not enforced a land use regulation that restricts the claimants' desired use of their property.

3. Effect of Regulations on Fair Market Value

In order to establish a valid claim, 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 \$1,500,000.00 resulting from enactment or enforcement of land use regulations.² The claim does not include an appraisal, nor does it define what portion, if any, of the alleged reduction in value is attributed to enforcement or enactment of the Oregon Highway Plan mobility standards.

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 that restricts the use of the property. Based on the record currently before ODOT, ODOT concludes that there are no land use regulations identified in the claim and enforced by ODOT 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)

² This value is derived by averaging the assessed value of adjacent subdivision lots to arrive at a per acre value, multiplying that by the total number of proposed acres of the twelve parcels claimants wish to create, after which the current assessed value and the estimated costs of development, including constructing a road and the installation of water, utilities and septic systems to each lot are deducted.

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) and (3) of this report, the claimants, Carl E. and Mary E. Wallace, have not established that the Oregon Highway Plan mobility standards restrict the use of the subject property in a manner that reduces the fair market value of the property.

Additionally, even *if* the Oregon Highway Plan were to be considered a land use regulation, its stated purpose is to ensure “Efficient management of the system to increase safety, preserve the system, and extend its capacity.” The mobility standards specifically have as one of their policy objectives the purpose of maintaining highway performance and improving highway safety.³ As such, both the Highway Plan generally and the mobility standards specifically were adopted to protect public health and safety.

Conclusions

ODOT concludes that the Highway Plan and the mobility standards were adopted to protect public safety and therefore are exempt from the requirement of ORS 197.352. ODOT concludes that based on the information in its record, the claimants have failed to demonstrate that the Oregon Highway Plan mobility standards restrict the claimants’ desired use of their property or that such standards are not exempt under ORS 197.352(3). 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, the Oregon Highway Plan mobility standards: (a) are not state “land use regulations,” (b) do not restrict the claimants’ use of their property, (c) have not had the effect of reducing the fair market

³ The closest state highway is U.S. 20, which is nearly half a mile away. The stated management objective in the *Oregon Highway Plan* for statewide highways is “...to provide safe and efficient, high-speed, continuous-flow operations.”

value of the property, and (d) are exempt as laws adopted to protect public health and safety.

Conclusion

Based on the foregoing findings and conclusions, the claimants have not established entitlement to relief under ORS 197.352, 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 October 23, 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. No comments were received.