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

IN THE MATTER OF THE CLAIM FOR COMPENSATION UNDER ORS 197.352 (BALLOT MEASURE 37) OF James Krause, CLAIMANT	))))	FINAL ORDER CLAIM NO. M129475

Claimant: James Krause (the Claimant)

Property: Township 3S, Range 3E, Section 2, Tax lot 600

Township 3S, Range 3E, Section 3, Tax lots 1501 and 2000

Clackamas 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 James Krause's partition of the 26.91-acre subject property into one- to five-acre parcels and development of a dwelling on each parcel: applicable provisions of Goal 3, ORS 215 and OAR 660, division 33, enacted or adopted after December 21, 1983. These laws will not apply to the claimant only to the extent necessary to allow him 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 December 21, 1983.

2. The action by the State of Oregon provides the state's authorization to the claimant to use the property for the use described in this report, subject to the standards in effect on December 21, 1983. On that date, the property was subject to applicable provisions of Goals 3 and 14 and OAR 660, division 5, as implemented by Clackamas County's acknowledged comprehensive plan, and the applicable provisions ORS 215, then in effect.

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

4. Any use of the subject property 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 the subject property, it may be necessary for him 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 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 the subject property 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 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, Deputy Director
DLCD
Dated this 1st day of December, 2006.

FOR the DEPARTMENT OF ADMINISTRATIVE SERVICES:

David Hartwig, Administrator
DAS, State Services Division
Dated this 1st day of December, 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, 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

December 1, 2006

STATE CLAIM NUMBER:	M129475
NAME OF CLAIMANT:	James Krause
MAILING ADDRESS:	18499 S Springwater Road Estacada, Oregon 97023
PROPERTY IDENTIFICATION:	Township 3S, Range 3E Section 2: tax lot 600 Section 3: tax lots 1501 and 2000 Clackamas County[1]
OTHER CONTACT INFORMATION:	Roderick A. Boutin Bowerman and Boutin, LLP PO Box 100 Oregon City, Oregon 97045
DATE RECEIVED BY DAS:	June 18, 2006
180-DAY DEADLINE:	December 5, 2006

I. SUMMARY OF CLAIM

The claimant, James Krause, seeks compensation in the amount of $1,389,862 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 the 26.91-acre subject property into one- to five-acre parcels and develop a dwelling on each parcel.[2] The subject property is located at the geographic coordinates listed above, near Estacada, in Clackamas County. (See claim.)

---

[1] The subject includes three tax lots. Tax lot 600 consists of 2.8 acres, tax lot 1501 consists of 0.55 acre and tax lot 2000 consists of 23.56 acres.

[2] The claim also indicates that the claimant desires to sell or transfer the newly created parcels for development. In effect, the claimant requests that a decision of the department to "not apply" (waive) certain laws as set forth in this report be transferable with the property. ORS 197.352 only authorizes a state agency to waive a law in order to allow the current owner a use of the property permitted at the time that owner acquired the property. A determination of transferability is beyond the scope of relief that the department may grant under ORS 197.352. The Oregon Department of Justice has advised the department that "[i]f the current owner of the real property conveys the property before a new use allowed by the public entity is established, then the entitlement to relief will be lost." Therefore, the relief granted in this report cannot and does not create a transferable waiver.

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 James Krause's partition of the 26.91-acre subject property into one- to five-acre parcels and development of a dwelling on each parcel: applicable provisions of Statewide Planning Goal 3 (Agricultural Lands), ORS 215 and Oregon Administrative Rules (OAR) 660, division 33, enacted or adopted after December 21, 1983. These laws will not apply to the claimant only to the extent necessary to allow him 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 December 21, 1983. (See the complete recommendation in Section VI. of this report.)

III. COMMENTS ON THE CLAIM

Comments Received

On September 26, 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, no written comments were received in response to the 10-day notice.

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 June 8, 2006, for processing under OAR 125, division 145. The claim identifies Senate Bill 100, House Bill 3660, ORS 197 and 215, provisions of OAR 660 and Clackamas County's zoning 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, James Krause, acquired the subject property from his parents, Adolph and Lydia Krause, on December 21, 1983, as reflected by a bargain and sale deed included with the claim.[3] Adolph and Lydia Krause acquired the subject property on April 9, 1963, as evidenced by a warranty deed included with the claim. The Clackamas County Assessor's Office confirms the claimant's current ownership of the subject property.

Conclusions

The claimant, James Krause, is an "owner" of the subject property as that term is defined by ORS 197.352(11)(C), as of December 21, 1983. The claimant's parents, Adolph and Lydia, are "family members" as defined by ORS 197.352(11)(A) and acquired the subject property on April 9, 1963.

---

[3] In response to the Draft Staff Report dated November 9, 2006, by correspondence dated November 20, 2006, claimant's agent asserts that the record requires the department to find that the claimant "personally acquired an ownership interest in the property on or before December 25, 1969." There is nothing in the record to support such a finding. In support of a 1969 personal acquisition date, claimant alleges by affidavit that following the death of Adolph Krause in 1969, the claimant's mother, Lydia Krause, made the claimant a "co-owner of and partner in all aspects of the Farm." Claimant's agent submitted various documents in support of the claimant's allegation including individual and partnership tax returns and statements from third parties suggesting that in 1969 Lydia Krause told them "the subject property belong to James Krause." The allegations of the claimant and documentation submitted by claimant's agent are not sufficient to establish that the claimant acquired an ownership interest in the subject property under ORS 197.352 on or before December 25, 1969. At most, the record suggests that in 1969 the claimant and his mother may have established a partnership for purposes of operating the family farm on the subject property. Under ORS 67.060, a partnership and not the individual partners, owns the partnership property. Thus, the establishment of a partnership would not establish the claimant's ownership interest in the property. Furthermore, the deeds under which claimant acquired a personal interest in the subject property controvert the assertion that Lydia Krause conveyed the subject property to the claimant on or before December 25, 1969. Claimant's affidavit characterizes the December 21, 1983, deed as a "formality she was precluded from doing sooner because of the 1963 mortgage with Federal Land Bank" and that it "memorialized her withdrawal as a partner and the relinquishment of her ownership interest at that date." Contrary these assertions, the December 21, 1983, deed from Lydia Krause to the claimant only conveyed an undivided 7 percent interest in the subject property. By deed dated January 22, 1988, Lydia Krause conveyed to the claimant an undivided 86 percent interest the subject property.

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 the 26.91-acre subject property into one- to five-acre parcels and develop a dwelling on each parcel, and that the desired use is not allowed under current land use regulations.[4]

The claim is based generally on the applicable provisions of state law that require Exclusive Farm Use (EFU) zoning and restrict uses on EFU-zoned land. The claimant's property is zoned by Clackamas County as EFU-80 as required by Goal 3, in accordance with ORS 215 and OAR 660, division 33, because the claimant's property is "agricultural land" as defined by Goal 3.[5] 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 the development of dwellings on existing or proposed parcels on that land.

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.)

---

[4] The claimant summarily cites numerous state land use laws as applicable to this claim, but does not establish how the laws either apply to the claimant's desired use of the subject property or restrict its use with the effect of reducing its fair market value. On their face, most of the regulations either do not apply to the claimant's property or do not restrict the use of the claimant's property in a manner that reduces its fair market value. This report addresses only those regulations that the department finds are applicable to and restrict the claimant's use of the subject property, based on the claimant's asserted desired use.

[5] The claimants' property is "agricultural land" because it contains Natural Resources Conservation Service Class I–IV soils.

The claimant's family first acquired the subject property in 1963, prior to the adoption of the statewide planning goals and their implementing statutes and regulations. No county zoning applied to the subject property in 1963.

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 the claimant's family acquired the subject property. These laws restrict the use of the subject property relative to the uses allowed when the claimant's family 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 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 $1,139,862 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 James Krause whose family acquired the subject property in 1963. 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 enacted or adopted since the claimant's family acquired the subject property restrict the claimant's desired use of the property. The claimant estimates that the effect of the regulations on the fair market value of the subject property is a reduction of $1,139,862.

Without an appraisal or other documentation and without verification of whether or the extent to which the claimant's desired use of the subject property was allowed under the standards in effect when his family acquired the property, 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 since the claimant's family 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 relative to the uses permitted when the claimant's family acquired the property, including applicable provisions of Goal 3, ORS 215 and OAR 660, division 33, which Clackamas County has implemented through its current EFU-80 zone. All of these land use regulations were enacted or adopted after the claimant's family acquired the subject property.

Conclusions

It appears that none of the general statutory, goal and rule restrictions on residential division and development of the subject property were in effect when the claimant's family acquired the property on April 9, 1963. As a result, these laws are not exempt under ORS 197.352(3)(E). Laws in effect when the claimant's family acquired the subject property are exempt under ORS 197.352(3)(E) and do not provide a basis for compensation. In addition, other land use laws enacted or adopted for a purpose set forth in ORS 197.352(3)(A) to (D) are also exempt and would not provide a basis for compensation.

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 $1,139,862. 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 claimant's desired use of the subject property was allowed under the standards in effect when the claimant's 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 James Krause to use the subject property for a use permitted at the time he acquired the property on December 21, 1983.

At the time the claimant acquired an interest the subject property on December 21, 1983, the property was subject to Clackamas County's acknowledged comprehensive plan.[6] Tax lots 1501 and 2000 were zoned EFU and tax lot 600 was zoned Rural Area Residential 1-acre District (RA-1).

When the claimant acquired the subject property, the claimant's desired use of tax lots 1501 and 2000 would have been governed by the county's acknowledged EFU zone and the applicable provisions of ORS 215 then in effect.[7] In 1983, ORS 215.263 (1983 edition) required that divisions of land in EFU zones be "appropriate for the continuation of the existing commercial agricultural enterprise within the area" or not smaller than the minimum size in the county's acknowledged plan. ORS 215.283(1)(f) (1983 edition) generally allowed farm dwellings "customarily provided in conjunction with farm use." Non-farm dwellings were allowed under ORS 215.283(3) if they were determined to be compatible with farm use, not interfere seriously with accepted farm practices, not materially alter the stability of the land use pattern in the area and be situated on generally unsuitable land for the production of farm crops and livestock.

When the claimant acquired the subject property, the claimant's desired use of tax lot 600 would have been subject to the provisions of the county's comprehensive plan and land use ordinances, including the provision of Goal 14 implemented by those regulations.

The claim does not establish whether or to what extent the claimant's desired division and development of the subject property allowed under the standards in effect when he acquired it on December 21, 1983.

In addition to the applicable provisions of Goals 3 and 14, ORS 215 and OAR 660 in effect on December 21, 1983, and other laws in effect when the claimant acquired the subject property, there may be other laws that apply to the claimant's 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 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, and depending on when they were enacted or adopted, may continue to apply to the claimant's 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.

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 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 claimant should be aware that the less information he has provided to the department in his claim, the

---

[6] Clackamas County's comprehensive plan was acknowledged by the Commission for goal compliance on December 31, 1981.

[7] After the county's comprehensive plan and land use regulations were acknowledged by the Commission as complying with the statewide planning goals, the goals and implementing rules no longer applied directly to individual local land use decisions. *Byrd v. Stringer*, 295 Or 311 (1983). However, statutory requirements continue to apply, and insofar as the state and local provisions are materially the same, the local provisions must be interpreted consistent with the substance of the goals and implementing rules. *Forster v. Polk County*, 115 Or App 475 (1992) and *Kenagy v. Benton County*, 115 Or App 131 (1992).

greater the possibility that there may be additional laws that will later be determined to continue to apply to his use of the subject 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 James Krause's partition of the 26.91-acre subject property into one- to five-acre parcels and development of a dwelling on each parcel: applicable provisions of Goal 3, ORS 215 and OAR 660, division 33, enacted or adopted after December 21, 1983. These laws will not apply to the claimant only to the extent necessary to allow him 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 December 21, 1983.

2. The action by the State of Oregon provides the state's authorization to the claimant to use the property for the use described in this report, subject to the standards in effect on December 21, 1983. On that date, the property was subject to applicable provisions of Goals 3 and 14 and OAR 660, division 5, as implemented by Clackamas County's acknowledged comprehensive plan, and the applicable provisions ORS 215, then in effect.

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

4. Any use of the subject property 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 the subject property, it may be necessary for him 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 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 the subject property by the claimant.

VII. COMMENTS ON THE DRAFT STAFF REPORT

The department issued its draft staff report on this claim on November 9, 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. No comments were received.