

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

IN THE MATTER OF THE CLAIM FOR )FINAL ORDER  
COMPENSATION UNDER ORS 197.352 )CLAIM NO. M129479  
(BALLOT MEASURE 37) OF )  
John A. McMahon and Barbara J. McMahon, CLAIMANTS )

Claimants: John A. McMahon and Barbara J. McMahon (the Claimants)

Property: Township 28S, Range 14W, Section 31CC, Tax lot 100  
Coos County (the Property)

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

Claimants submitted the Claim to the State of Oregon under ORS 197.352. Under OAR 125-145-0010 *et seq.*, the Department of Administrative Services (DAS) referred the Claim to the Department of Land Conservation and Development (DLCD) as the regulating entity. This order is based on the record herein, including the Findings and Conclusions set forth in the Final Staff Report and Recommendation of DLCD (the DLCD Report) attached to and by this reference incorporated into this order.

ORDER

The Claim is approved as to laws administered by DLCD and the Land Conservation and Development Commission (LCDC) for the reasons set forth in the DLCD Report, and subject to the following terms:

1. In lieu of compensation under ORS 197.352, the State of Oregon will not apply the following laws to John and Barbara McMahon's division of the 18.95-acre subject property into 20 parcels of not less than 0.9 acre each or to their development of a dwelling on each parcel: applicable provisions of Goal 3, ORS 215 and OAR 660, division 33, enacted or adopted after January 20, 2005. These land use regulations will not apply to the claimants only to the extent necessary to allow them to use the subject property for the use described in this report, and only to the extent that use was permitted when they acquired the property on January 20, 2005. The department acknowledges that the relief to which the claimants are entitled under ORS 197.352 will not allow the claimants to use the subject property in the manner set forth in the claim.
2. The action by the State of Oregon provides the state's authorization to the claimants to use the subject property for the use described in this report, subject to the standards in effect on January 20, 2005. At that time, the property was subject to applicable provisions of Goal 3, ORS 215 and OAR 660, division 33, currently in effect.

3. To the extent that any law, order, deed, agreement or other legally enforceable public or private requirement provides that the subject property may not be used without a permit, license or other form of authorization or consent, the order will not authorize the use of the property unless the claimants first obtain that permit, license or other form of authorization or consent. Such requirements may include, but are not limited to: a building permit, a land use decision, a "permit" as defined in ORS 215.402 or 227.160, other permits or authorizations from local, state or federal agencies and restrictions on the use of the subject property imposed by private parties.

4. Any use of the subject property by the claimants under the terms of the order will remain subject to the following laws: (a) those laws not specified in (1) above; (b) any laws enacted or enforced by a public entity other than the Commission or the department; and (c) those laws not subject to ORS 197.352 including, without limitation, those laws exempted under ORS 197.352(3).

5. Without limiting the generality of the foregoing terms and conditions, in order for the claimants to use the subject property, it may be necessary for them to obtain a decision under ORS 197.352 from a city and/or county and/or metropolitan service district that enforces land use regulations applicable to the property. Nothing in this order relieves the claimants from the necessity of obtaining a decision under ORS 197.352 from a local public entity that has jurisdiction to enforce a land use regulation applicable to a use of the subject property by the claimants.

This Order is entered by the 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 30<sup>th</sup> day of November, 2006.

FOR the DEPARTMENT OF  
ADMINISTRATIVE SERVICES:



David Hartwig, Administrator  
DAS, State Services Division  
Dated this 30<sup>th</sup> day of November, 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**

November 30, 2006

**STATE CLAIM NUMBER:** M129479

**NAMES OF CLAIMANTS:** John A. McMahon  
Barbara J. McMahon

**MAILING ADDRESS:** PO Box 2069  
Bandon, Oregon 97411

**PROPERTY IDENTIFICATION:** Township 28S, Range 14W, Section 31CC  
Tax lot 100  
Coos County

**OTHER CONTACT INFORMATION:** Emmett McIntosh  
33711 Oak Flat Road  
Agness, Oregon 97406

**DATE RECEIVED BY DAS:** June 8, 2006

**180-DAY DEADLINE:** December 5, 2006

**I. SUMMARY OF CLAIM**

The claimants, John and Barbara McMahon, seek compensation in the amount of \$1,733,539 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 18.95-acre property into 20 parcels of not less than 0.9 acre each and to develop a dwelling on each parcel. The subject property is located at 50205 Highway 101, near Bandon, in Coos County. (See claim.)

**II. SUMMARY OF STAFF RECOMMENDATION**

Based on the findings and conclusions set forth below, the Department of Land Conservation and Development (the department) has determined that the claim is valid. Department staff recommends that, in lieu of compensation, the requirements of the following state laws enforced by the Land Conservation and Development Commission (the Commission) or the department not apply to John and Barbara McMahon's division of the 18.95-acre property into 20 parcels of not less than 0.9 acre each and to their 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 January 20, 2005. These laws will not apply to the claimants only to the extent necessary to allow them to use the subject

property for the use described in this report, and only to the extent that use was permitted when they acquired the property on January 20, 2005. The department acknowledges that the relief to which the claimants are entitled under ORS 197.352 will not allow the claimants to use the subject property in the manner set forth in the claim. (See the complete recommendation in Section VI. of this report.)

### **III. COMMENTS ON THE CLAIM**

#### **Comments Received**

On September 26, 2006, pursuant to Oregon Administrative Rules (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 Coos County Exclusive Farm Use (EFU) 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.” ORS 197.352(11)(A) defines “family member”, among other things, as “a legal entity owned by any one or combination of these family members or the owner of the property.”

### **Findings of Fact**

The claimants, John and Barbara McMahon, acquired the subject property on January 20, 2005, as reflected by a statutory bargain and sale deed included with the claim, wherein Norton and Dean, a partnership, was the grantor and the McMahon Family Trust was the grantee. John and Barbara McMahon were partners of the Norton and Dean Partnership and are the trustees of the McMahon Family Trust, a revocable trust established on June 16, 1993. The Norton and Dean Partnership acquired the subject property on September 27, 1974, as reflected by the deed creating tenancy in partnership.<sup>1</sup> The Coos County Assessor’s Office confirms the claimants’ current ownership of the subject property.

### **Conclusions**

The claimants, John and Barbara McMahon, are “owners” of the subject property as that term is defined by ORS 197.352(11)(C), as of January 20, 2005. The claimants’ “family member,” as that term is defined in ORS 197.353(11)(A), acquired the subject property as of September 27, 1974.

### **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.

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<sup>1</sup> Claimants assert a personal acquisition date of September 27, 1974, through the deed creating tenancy in partnership. However, the deed conveys the subject property to “Jack Dean, John A. McMahon and Barbara J. McMahon as tenants in partnership doing business as Norton and Dean,” as grantees. Likewise, the statutory bargain and sale deed conveying the subject property to the McMahon Family Trust dated January 20, 2005, describes the grantor as “Norton and Dean, a partnership consisting of John A. McMahon, Partner, and Barbara J. McMahon, Partner and tenants in partnership.” Under ORS 67.050, a partnership is an entity distinct from its partners. Under ORS 67.055(1), a partnership is an “association of two or more persons to carry on as co-owners a business for profit, whether or not the persons intend to create a partnership.” Among the factors that are to be considered in determining whether or not persons intended to create a partnership is the persons’ express intent to be partners. ORS 67.055(4)(a)(A). The recitations in the referenced deeds constitute the claimants’ express intent to create a partnership, the Norton and Dean Partnership, an entity distinct from its original partners, Jack Dean, John A. McMahon and Barbara J. McMahon. Under ORS 197.352(11)(A), a partnership can be a family member of individuals who are the present owners of real property. The documents submitted with the claim do not establish the disposition of the partnership interest of Jack Dean.

## **Findings of Fact**

The claim indicates that the claimants desire to divide the 18.95-acre subject property into 20 parcels of not less than 0.9 acre each and to develop a dwelling on each parcel, and that current land use regulations prevent the desired use.

The claim is based generally on the applicable provisions of state law that require EFU zoning and restrict uses on EFU-zoned land. The claimants' property is zoned EFU by Coos County, as required by Goal 3, in accordance with ORS 215 and OAR 660, division 33, because the claimants' property is "agricultural land" as defined by Goal 3.<sup>2</sup> Goal 3 became effective on January 25, 1975, and required agricultural land defined by Goal 3 to 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 desired division of EFU-zoned land into parcels less than 80 acres and establish standards for the development of dwellings on existing 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.

Land that is zoned EFU and that is "high-value" farm land under Goal 3, ORS 215.710 and OAR 660, division 33, is subject to additional restrictions based on certain provisions of ORS 215 and OAR 660, division 33.

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 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.)

The claimants' family member first acquired the subject property on September 27, 1974, after the adoption of Senate Bill 100 (Chapter 80, Oregon Laws 1973) effective on October 5, 1973, but before the adoption of the statewide planning goals effective on January 25, 1975.

During the period between October 5, 1973, and January 25, 1975, ORS 197.175(1) and 197.280 (1973 editions) required, in addition to any local plan or zoning provisions, that cities and counties exercise their planning responsibilities in accordance with the interim land use planning goals set forth in ORS 215.515 (1973 edition). *Petersen v. Klamath Falls*, 279 Or 249 (1977); *see also, Meeker v. Board of Comm'rs*, 287 Or 665 (1979) (review of a subdivision is an exercise of planning responsibilities requiring application of the goals); *State Housing Council v. Lake*

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<sup>2</sup> The claimants' property is "agricultural land" because it contains Natural Resources Conservation Service Class I-IV soils.

*Oswego*, 48 Or App. 525 (1981) (noting that while “[l]and use planning responsibility is not defined in ORS ch 197, the Supreme Court has interpreted that term as including annexation approvals, *subdivision approvals* [emphasis added] and partition approvals”) citing *Petersen, Meeker and Alexanderson v. Polk County*, 285 Or 427 (1980). The claimants’ desired use includes subdivision of their land. If the claimants’ family member had sought to create that use in 1974, as a matter of law, the use would have been subject to the interim planning goals at ORS 215.515.<sup>3</sup>

The following interim goals are directly applicable to this claim: “To preserve the quality of the air, water and *land* [emphasis added] resources of the state”; “To conserve prime farm lands for the production of crops”; “To provide for the orderly and efficient transition from rural to urban land use”; “To protect life and property in areas subject to floods, landslides and other natural disasters”; “To provide and encourage a safe, convenient and economic transportation system including all modes of transportation: Air, water, rail, highway and mass transit and recognizing differences in the social costs in the various modes of transportation”; and “To develop a timely, orderly and efficient arrangement of public facilities and services to serve as a framework for urban and rural development.” ORS 215.515 (1973 edition).

No information has been provided establishing whether or to what extent the claimants’ desired division of the subject property for residential development complies with the interim planning goals set forth in ORS 215.515 (1973 edition) in effect at the time the claimants’ family member acquired the property on September 27, 1974.

### **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 claimants’ family member acquired the subject property. However, the claim does not establish whether or to what extent the claimants’ desired use of the subject property complies with the interim planning goal in effect when the claimants’ family member acquired the property on September 27, 1974.

### **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.”

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<sup>3</sup> The “interim” land use goals are set forth in ORS 215.515(1)(a) to (j) (1973 edition) as follows: (a) “To preserve the quality of the air, water and land resources of the state,” (b) “To conserve open space and protect natural and scenic resources,” (c) “To provide for the recreational needs of citizens of the state and visitors,” (d) “To conserve prime farm lands for the production of crops,” (e) “To provide for the orderly and efficient transition from rural to urban land use,” (f) “To protect life and property in areas subject to floods, landslides and other natural disasters,” (g) “To provide and encourage a safe, convenient and economic transportation system including all modes of transportation: Air, water, rail, highway and mass transit and recognizing differences in the social costs in the various modes of transportation,” (h) “To develop a timely, orderly and efficient arrangement of public facilities and services to serve as a framework for urban and rural development,” (i) “To diversify and improve the economy of the state” and (j) “To ensure that the development of properties within the state is commensurate with the character and the physical limitations of the land.” ORS 215.515 (1973 edition).

### **Findings of Fact**

The claim includes an estimate of \$1,733,539 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 claimants' assessment of the property's value.

### **Conclusions**

As explained in Section V.(1) of this report, the claimants are John and Barbara McMahon, whose family member acquired the subject property in 1974. Under ORS 197.352, the claimants are due compensation for land use regulations that restrict the use of the 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 member 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 \$1,733,539.

Without an appraisal or other documentation, and without verification of whether or the extent to which the claimants' desired use of the subject property was allowed under the standards in effect when the claimants' family member 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 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 since the claimants' family member 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 claimants' family member acquired the property, including applicable provisions of Goal 3, ORS 215 and OAR 660, division 33, which Coos County has implemented through its current EFU zone. With the exception of applicable provisions of ORS 215, including the interim land use planning goals in effect on September 27, 1974, these state land use regulations were not in effect when the claimants' family member acquired the property.

### **Conclusions**

It appears that with the exception of the provisions of ORS 215 in effect on September 27, 1974, none of the general statutory, goal and rule restrictions on residential division and development of the subject property were in effect when the claimants' family member acquired the property. As a result, these laws are not exempt under ORS 197.352(3)(E). Laws in effect when the claimants' family member 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 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 \$1,733,539. 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 subject property was allowed under the standards in effect when their family member 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 John and Barbara McMahon to use the subject property for a use permitted at the time they acquired the property on January 20, 2005.

At the time the claimants acquired an interest in the subject property, it was zoned EFU by Coos County and subject to the current lot size and dwelling standards under Goal 3, ORS 215 and OAR 660, division 33, and as described in Section V.(2) of this report.

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

## 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 John and Barbara McMahon's division of the 18.95-acre subject property into 20 parcels of not less than 0.9 acre each or to their development of a dwelling on each parcel: applicable provisions of Goal 3, ORS 215 and OAR 660, division 33, enacted or adopted after January 20, 2005. These land use regulations will not apply to the claimants only to the extent necessary to allow them to use the subject property for the use described in this report, and only to the extent that use was permitted when they acquired the property on January 20, 2005. The department acknowledges that the relief to which the claimants are entitled under ORS 197.352 will not allow the claimants to use the subject property in the manner set forth in the claim.
2. The action by the State of Oregon provides the state's authorization to the claimants to use the subject property for the use described in this report, subject to the standards in effect on January 20, 2005. At that time, the property was subject to applicable provisions of Goal 3, ORS 215 and OAR 660, division 33, currently in effect.
3. To the extent that any law, order, deed, agreement or other legally enforceable public or private requirement provides that the subject property may not be used without a permit, license or other form of authorization or consent, the order will not authorize the use of the property unless the claimants first obtain that permit, license or other form of authorization or consent. Such requirements may include, but are not limited to: a building permit, a land use decision, a "permit" as defined in ORS 215.402 or 227.160, other permits or authorizations from local, state or federal agencies and restrictions on the use of the subject property imposed by private parties.
4. Any use of the subject property by the claimants under the terms of the order will remain subject to the following laws: (a) those laws not specified in (1) above; (b) any laws enacted or enforced by a public entity other than the Commission or the department; and (c) those laws not subject to ORS 197.352 including, without limitation, those laws exempted under ORS 197.352(3).
5. Without limiting the generality of the foregoing terms and conditions, in order for the claimants to use the subject property, it may be necessary for them to obtain a decision under ORS 197.352 from a city and/or county and/or metropolitan service district that enforces land use regulations applicable to the property. Nothing in this order relieves the claimants from the necessity of obtaining a decision under ORS 197.352 from a local public entity that has jurisdiction to enforce a land use regulation applicable to a use of the subject property by the claimants.

## **VII. COMMENTS ON THE DRAFT STAFF REPORT**

The department issued its draft staff report on this claim on November 9, 2006. OAR 125-145-0100(3), provided an opportunity for the claimants or the claimants' authorized agent and any third parties who submitted comments under OAR 125-145-0080 to submit written comments, evidence and information in response to the draft staff report and recommendation. No comments were received.