

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. M129588
(BALLOT MEASURE 37) OF	)	
Walter and Sara Maguire, CLAIMANTS	)	

Claimants: Walter and Sara Maguire (the Claimants)

Property: Township 12S, Range 11W, Section 18, Tax lots 100, 101, 300, 16300 and 16400  
Lincoln 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 Walter and Sara Maguire's division of the 81-acre property into eighty-one 1-acre parcels for their residential development: the applicable provisions of Goal 14 and OAR 660-004-0040, adopted after October 17, 1990. These land use regulations will not apply to the claimants 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 the use was permitted when they acquired the property on October 17, 1990 .
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 October 17, 1990. On that date, the property was subject to applicable provisions of Goal 14, as implemented by Lincoln County's acknowledged comprehensive plan, then in effect.
3. To the extent that any law, order, deed, agreement or other legally enforceable public or private requirement provides that the 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

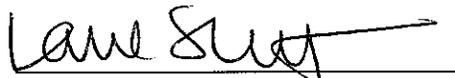
claimants first obtain that permit, license or other form of authorization or consent. Such requirements may include, but are not limited to: a building permit, a land use decision, a "permit" as defined in ORS 215.402 or 227.160, other permits or authorizations from local, state or federal agencies and restrictions on the use of the property imposed by private parties.

4. Any use of the 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 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 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 21<sup>st</sup> day of December, 2006.

FOR the DEPARTMENT OF  
ADMINISTRATIVE SERVICES:

  
David Hartwig, Administrator  
DAS, State Services Division  
Dated this 21<sup>st</sup> 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 21, 2006

**STATE CLAIM NUMBER:** M129588

**NAMES OF CLAIMANTS:** Walter and Sara Maguire

**MAILING ADDRESS:** 14075 NW Alika Drive  
Seal Rock, Oregon 97376

**PROPERTY IDENTIFICATION:** Township 12S, Range 11W, Section 18  
Tax lots 100, 101, 300, 16300 and 16400  
Lincoln County

**OTHER CONTACT INFORMATION:** Gary C. Hamilton  
407 N. Coast Highway  
Newport, Oregon 97365

**DATE RECEIVED BY DAS:** June 27, 2006

**180-DAY DEADLINE:** December 24, 2006

**I. SUMMARY OF CLAIM**

The claimants, Walter and Sara Maguire, seek compensation in the amount of \$3,360,400 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 81-acre subject property into eighty-one 1-acre parcels for residential development. The subject property is located at the geographic coordinates above, near Seal Rock, in Lincoln 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 Walter and Sara Maguire's division of the 81-acre subject property into eighty-one 1-acre parcels for their residential development: applicable provisions of Statewide Planning Goal 14 (Urbanization) and Oregon Administrative Rule (OAR) 660-004-0040, adopted after October 17, 1990. 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 October 17, 1990. (See the complete recommendation in Section VI. of this report.)

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

#### **Comments Received**

On October 19, 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, 10 written comments were received in response to the 10-day notice.

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

### **IV. TIMELINESS OF CLAIM**

#### **Requirement**

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

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

#### **Findings of Fact**

This claim was submitted to DAS on June 27, 2006, for processing under OAR 125, division 145. The claim identifies Lincoln County rural residential zoning and "any and all" state laws and rules that reduce the fair market value of the property" 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 claimants, Walter and Sara Maguire, acquired the subject property on October 17, 1990, as reflected by the warranty deed included with the claim. The Lincoln County Assessor’s Office confirms the claimants’ current ownership of the subject property.

### Conclusions

The claimants, Walter and Sara Maguire, are “owners” of the subject property, as that term is defined by ORS 197.352(11)(C) as of October 17, 1990 .

### 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 81-acre subject property into eighty-one 1-acre parcels for residential development, and Lincoln County’s current land use regulations prevent the desired use.<sup>1</sup>

The claim is based on the provisions of state law that regulate rural residential zoning. The claimants’ property is zoned RR 2 (Rural Residential 2 acre minimum lot size) by Lincoln County. The RR 2 zone is consistent with Goal 14, which generally requires that land outside of urban growth boundaries be used for rural uses. Lincoln County’s RR 2 zone was adopted on July 12, 2000, and requires a minimum of two acres for the creation of a new lot or parcel.

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

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<sup>1</sup> The claimants summarily cite state land use laws as applicable to this claim, but do not establish how any particular state land use regulation either applies to the claimants’ desired use of the subject property or restricts its use with the effect of reducing its fair market value. On their face, most state land use regulations either do not apply to the claimants’ property or do not restrict the claimants’ desired use of the property with the effect of reducing its fair market value. This report addresses only those regulations that the department finds are applicable to and restrict the claimants’ use of the subject property, based on the claimants’ description of the desired use.

decision,<sup>2</sup> 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 the area of any new lots or parcels in a rural residential zone in effect on October 4, 2000, must be at least two acres. If a county rural residential zone specifies a minimum lot or parcel size smaller than two acres, the area of any new lot or parcel shall equal or exceed two acres (OAR 660-004-0040(5)(b) and (7)(d)). The creation of any new lot or parcel smaller than two acres in a rural residential zone is considered an urban use, and may be created only if an exception to Goal 14 is taken (OAR 660-004-0040(7)(a)). Some relief from these provisions is available for lots or parcels having more than one permanent habitable dwelling pursuant to OAR 660-004-0040(7)(h). Because Lincoln County's rural residential zone was in effect on October 4, 2000, and allows a lot or parcel size less than two acres, OAR 660-004-0040 requires that all new lots or parcels have a minimum lot or parcel size of two acres or more, unless an exception to Goal 14 is taken.

When the claimants acquired the property on October 17, 1990, it was subject to Lincoln County's acknowledged comprehensive plan. Residential development of the subject property at that time 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.

### **Conclusions**

The minimum lot size requirements for rural residential lots or parcels established by amendments to Goal 14 and OAR 660-004-0040 were adopted after the claimants acquired the subject property in 1990, and do not allow the desired division of the property. However, the claim does not establish whether or to what extent the claimants' desired level of development would have been permitted under the laws in effect in 1990 when the claimants acquired the property.

This report addresses only those state laws that are identified in the claim, or that the department is certain apply to the property based on the use that the claimants have identified. There may be other laws that currently apply to the claimants' use of the 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 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 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>2</sup> *1000 Friends of Oregon v. LCDC (Curry County)*, 301 Or 447 (1986).

### **Findings of Fact**

The claim includes an estimate of \$3,360,400 as the reduction in the 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 Walter and Sara Maguire who acquired the subject property on October 17, 1990. 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 adopted since the claimants 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 \$3,360,400.

Without an appraisal or other documentation, and without verification of whether or the extent to which the property could be divided in 1990, it is not possible to substantiate the specific dollar amount by which the land use regulations have reduced the fair market value of the property. Nevertheless, based on the evidence in the record for this claim, the department determines that the fair market value of the subject property has been reduced to some extent as a result of land use regulations enforced by the Commission or the department.

### **4. Exemptions Under ORS 197.352**

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 claimants' property, including Goal 14 and OAR 660-004-0040, which Lincoln County has implemented through its RR 2 zone. With the exception of provisions of Goal 14 in effect when the claimants acquired the subject property on October 17, 1990, these land use regulations were adopted after the claimants acquired the property.

### **Conclusions**

Without a specific development proposal for the 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 the general goal and rule restrictions on residential division of the claimants' property are not exempt under ORS 197.352(3)(E) only to the extent they were adopted after the claimants acquired the property. Provisions of Goal 14 in effect when the claimants acquired the property in 1990 are exempt under ORS 197.352(3)(E) and will continue to apply to the property.

Other laws in effect when the claimants acquired the property are also 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 property that have not been identified in the claim. In some cases, it will not be possible to know which laws apply to a use of property until there is a specific proposal for that use. When the 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 property based on the use that the claimants have identified. Similarly, this report only addresses the exemptions provided for under ORS 197.352(3) that are clearly applicable, given the information provided to the department in the claim. The claimants should be aware that the less information they have provided to the department in the claim, the greater the possibility that there may be additional laws that will later be determined to continue to apply to their use of the 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 \$3,360,400. 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 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 they 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 Walter and Sara Maguire to use the subject property for a use permitted at the time they acquired the property on October 17, 1990.

## 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 Walter and Sara Maguire's division of the 81-acre property into eighty-one 1-acre parcels for their residential development: the applicable provisions of Goal 14 and OAR 660-004-0040, adopted after October 17, 1990. These land use regulations will not apply to the claimants 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 the use was permitted when they acquired the property on October 17, 1990.
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 October 17, 1990. On that date, the property was subject to applicable provisions of Goal 14, as implemented by Lincoln County's acknowledged comprehensive plan, then in effect.
3. To the extent that any law, order, deed, agreement or other legally enforceable public or private requirement provides that the 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 property imposed by private parties.
4. Any use of the 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 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 property by the claimants.

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

The department issued its draft staff report on this claim on November 28, 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.