

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. M129696  
(BALLOT MEASURE 37) OF )  
Jimmie C. and Pamela J. Peterson, CLAIMANTS )

Claimants: Jimmie C. and Pamela J. Peterson (the Claimants)

Property: Township 8S, Range 5W, Section 3, Tax lot 500, Polk County  
(the property)

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

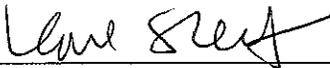
Claimants submitted the Claim to the State of Oregon under ORS 197.352. Under OAR 125-145-0010 *et seq.*, the Department of Administrative Services (DAS) referred the Claim to the Department of Land Conservation and Development (DLCD) as the regulating entity. This order is based on the record herein, 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 denied as to laws administered by DLCD and the Land Conservation and Development Commission (LCDC) for the reasons set forth in the DLCD Report.

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 chapter 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 chapter 125, division 145, and ORS chapter 293.

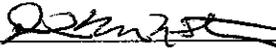
FOR DLCD AND THE LAND  
CONSERVATION AND  
DEVELOPMENT COMMISSION:



Lane Shetterly, Director  
DLCD

Dated this 10<sup>th</sup> day of January, 2007.

FOR THE DEPARTMENT OF  
ADMINISTRATIVE SERVICES:



David Hartwig, Administrator  
DAS, State Services Division

Dated this 10<sup>th</sup> day of January, 2007.

**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)

**ORS 197.352 (BALLOT MEASURE 37) CLAIM FOR COMPENSATION**  
**OREGON DEPARTMENT OF LAND CONSERVATION AND DEVELOPMENT**  
**Final Staff Report and Recommendation**

January 10, 2007

**STATE CLAIM NUMBER:** M129696

**NAMES OF CLAIMANTS:** Jimmie C. and Pamela J. Peterson

**MAILING ADDRESS:** 12495 Clow Corner Road  
Dallas, Oregon 97338

**PROPERTY IDENTIFICATION:** Township 8S, Range 5W, Section 3  
Tax lot 500  
Polk County

**DATE RECEIVED BY DAS:** July 18, 2006

**180-DAY DEADLINE:** January 14, 2006

**I. SUMMARY OF CLAIM**

The claimants, Jimmie and Pamela Peterson, seek compensation in the amount of \$3.24 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 20-acre subject property into 72 parcels for residential development.<sup>1</sup> The subject property is located at 12495 Clow Corner Road, near Dallas, in Polk 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 not valid because neither the Land Conservation and Development Commission (the Commission) nor the department has enforced laws that restrict the claimants' use of the private real property relative to uses permitted when the claimants acquired the property, and no laws enforced by the Commission or the department have the effect of reducing the property's fair market value. (See the complete recommendation in Section VI. of this report.)

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<sup>1</sup> The claim also indicates that the claimants desire to sell or transfer the newly created parcels for development. In effect, the claimants request 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."

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

#### **Comments Received**

On October 23, 2006, pursuant to Oregon Administrative Rule (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 July 18, 2006, for processing under OAR 125, division 145. The claim identifies Polk County's Exclusive Farm Use (EFU) zoning, ORS 92, 197, 215 and 227 and OAR 660 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, Jimmie and Pamela Peterson, acquired the subject property on May 9, 1973, as reflected by a deed included with the claim. The Polk County Assessor's Office confirms the claimants' current ownership of the subject property.

## **Conclusions**

The claimants, Jimmie and Pamela Peterson, are "owners" of the subject property as that term is defined by ORS 197.352(11)(C), as of May 9, 1973.

## **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 20-acre subject property into 72 parcels for residential development, and that the use is not allowed under current land use regulations.<sup>2</sup>

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 Polk County as required by Statewide Planning Goal 3 (Agricultural Lands), in accordance with ORS 215 and OAR 660, division 33, because the claimants' property is "agricultural land" as defined by Goal 3.<sup>3</sup> 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 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.

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<sup>2</sup> The claimants summarily cite numerous state land use laws as applicable to this claim, but do not establish how the laws either apply to the claimants' 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 claimants' property or do not restrict the use of the claimants' 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 claimants' use of the subject property, based on the claimants' asserted desired use.

<sup>3</sup> The claimants' property is "agricultural land" because it contains Natural Resources Conservation Service Class I-IV soils.

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.)

The claimants acquired the subject property on May 9, 1973, prior to the adoption of statewide planning goals and their implementing statutes and regulations. However, at that time, the subject property was zoned by Polk County as Agriculture, Grazing and Timber-Raising District (AGT), which restricted the use of the property to agricultural, grazing and/or timber use and allowed dwellings only to carry out one of those specified uses. That zone did not allow non-farm related residential subdivisions and provided that “no variances shall be granted on tracts of five acres or more.”

### **Conclusions**

The current zoning requirements, minimum lot size and dwelling standards established by Goal 3, ORS 215 and OAR 660, division 33, were all enacted or adopted since the claimants acquired the property in 1973 and do not allow the claimants’ desired division and development. However, the claimants’ desired use of the subject property was also prohibited by the zoning in effect when they acquired the property in 1973. The claim does not establish any state laws enforced by the Commission or the department that restrict the claimants’ desired use of the subject property relative to uses permitted when the claimants acquired the property in 1973.

### **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 \$3.24 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 claimants’ assessment of the subject property’s value.

### **Conclusions**

As explained in Section V.(2) of this report, current state land use regulations do not restrict the use of the subject property relative to the uses allowed when the claimants acquired the property in 1973. Land use regulations enacted or adopted by the Commission or the department since the claimants acquired the property do not have the effect of reducing the fair market value of the property relative to uses allowed in 1973, because the claimants’ desired use of the property was prohibited by the zoning in effect at the time they 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 including Goal 3, ORS 215 and OAR 660, division 33, which Polk County has implemented through its current EFU zone. These regulations were enacted or adopted after the claimants acquired the subject property.

#### **Conclusions**

It appears that the general statutory, goal and rule restrictions on subdivision and residential development and use of the subject property apply to the claimants' desired use of the subject property. These laws were enacted or adopted since the claimants acquired the property and, therefore, are not exempt under ORS 197.352(3)(E). However, as discussed in Section V.(2) of this report, these laws do not restrict the claimants' desired use of the subject property relative to uses permitted when the claimants acquired the property in 1973, because the claimants' desired use was prohibited by the zoning in effect when they acquired 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 do not restrict the claimants' desired use of the subject property relative to what was permitted when they acquired it in 1973 and do not reduce the fair market value of the property.

#### **Conclusions**

Based on the record before the department, the claimants, Jimmie and Pamela Peterson, have not established that they are entitled to relief under ORS 197.352(1), as a result of land use regulations enforced by the Commission or the department. The department recommends that this claim be denied, because the claimants' desired use of the property was prohibited under the zoning in effect when they acquired the property in 1973. Neither the Commission nor the department has enforced laws enacted or adopted after the claimants acquired the subject

property that restrict the claimants' use of the subject property relative to uses permitted when they acquired the property, and therefore, no laws enforced by the Commission or the department have the effect of reducing the property's fair market value.

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

The department issued its draft staff report on this claim on December 18, 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.