



# Oregon

Theodore R. Kulongoski, Governor

## Department of Land Conservation and Development

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April 20, 2007

To: Interested Persons

From: Lane Shetterly, Director



*Re: Ballot Measure 37 (ORS 197.352) Claim Number M130468*

*Claimant: Robert D. Neikes Trust*

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Enclosed, in regard to the above-referenced claim for compensation under Ballot Measure 37 (ORS 197.352), is the Final Staff Report and Recommendation of the Department of Land Conservation and Development, and the Final Order.

This Final Staff Report and Recommendation and the Final Order constitute the final decision on this claim. No further action will be taken on this matter.

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. M130468
(BALLOT MEASURE 37) OF	)	
Robert Neikes, CLAIMANT	)	

Claimant: Robert Neikes (the Claimant)

Property: Township 5N, Range 10W, Section 19AD, Tax lot 900 (Block 23-Lots 5, 6, 7, 8, 11 and 12), Clatsop 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 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

  
Cora R. Parker, Deputy Director  
DLCD  
Dated this 20<sup>th</sup> day of April, 2007.

FOR THE DEPARTMENT OF  
ADMINISTRATIVE SERVICES:

  
David Hartwig, Administrator  
DAS, State Services Division  
Dated this 20<sup>th</sup> day of April, 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**

April 20, 2007

**STATE CLAIM NUMBER:** M130468

**NAME OF CLAIMANT:** Robert Neikes

**MAILING ADDRESS:** c/o Jill S. Gelineau  
Schwabe, Williamson & Wyatt  
1211 SW 5th Ave., Suite 1900  
Portland, Oregon 97204

**PROPERTY IDENTIFICATION:** Township 5N, Range 10W, Section 19AD  
Tax lot 900  
(Block 23-Lots 5, 6, 7, 8, 11 and 12)  
Clatsop County

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

**180-DAY DEADLINE:** April 25, 2007

**I. SUMMARY OF CLAIM**

The claimant, Robert Neikes, seeks compensation in the amount of \$1,265,000 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 adjust the lot lines between Lots 11 and 12 so that they both front on 6th Street, to extend public utilities to Lots 5, 6, 7, 8, 11 and 12, and to develop a dwelling on each lot. The property is located at the intersection of 6th Street and Hemlock Street, within the City of Cannon Beach, in Clatsop 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 the state land use regulations enforced by the Land Conservation and Development Commission (the Commission) or the department that restrict the claimant's desired use of the property are exempt under ORS 197.352(3)(B). (See the complete recommendation in Section VI. of this report.)

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

#### **Comments Received**

On March 13, 2007, 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 October 27, 2006, for processing under OAR 125, division 145. The claim identifies ORS 197 and 215 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 claimant, Robert Neikes, acquired the subject property from his wife, Betty Jane Neikes, on June 17, 1985, as reflected by the bargain and sale deed included with the claim. The claimant and his wife originally acquired the property on February 17, 1967. On November 20, 1995, the claimant transferred the property to a revocable trust, the Robert D. Neikes Trust, as reflected by the deed included in the claim.<sup>1</sup> The Clatsop County Assessor's Office confirms the claimant's current ownership of the subject property.

## **Conclusions**

The claimant, Robert Neikes, is an "owner" of the subject property as that term is defined in ORS 197.352(11)(C), as of June 17, 1985. Betty Jane Neikes is a "family member" of the claimant as defined by ORS 197.352(11)(A) and acquired the subject property on February 17, 1967.

## **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 or a family member acquired the property.<sup>2</sup>

## **Findings of Fact**

The claim indicates that the claimant desires to adjust the lot lines between Lots 11 and 12 so that they both front on 6th Street, to extend public utilities to Lots 5, 6, 7, 8, 11 and 12 and to develop a dwelling on each lot, and that the current zoning prohibits the desired use.<sup>3</sup>

The claim is based on the applicable provisions of state law that require City of Cannon Beach's Wetland Overlay (WO) zone and Flood Hazard Overlay (FHO) zone.

The claimant's property is zoned WO as required by Statewide Planning Goal 17 (Coastal Shorelands) because the claimant's property is within the "coastal shoreland" planning area as defined by Goal 17.<sup>4</sup>

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<sup>1</sup> Transfer of property to a revocable trust does not result in a change in ownership for purposes of ORS 197.352.

<sup>2</sup> The claimant has 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 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 claimant's desired use of the subject property, based on the claimant's description of his desired use.

<sup>3</sup> The claimant states that he desires a "lot line adjustment." Absent the Goal 17 restrictions on the claimant's use of the subject property, the claimant has not established that any state land use regulations restrict his desired lot line adjustment.

<sup>4</sup> The City of Cannon Beach adopted Ordinance 94-29 in 1994 to establish the WO zone.

Goal 17 became effective on June 7, 1977, and required that lands within the coastal shoreland boundary be zoned as shoreland. It also required that local jurisdictions develop comprehensive plans to identify and inventory specific coastal resources within the shoreland area, prepare plans that protect those resources and provide for specific uses.<sup>5</sup> Further, Goal 17 required that local governments inventory areas specifically subject to various forms of coastal hazards and apply plan policies to mitigate those hazards.<sup>6</sup> Upon its adoption in 1977, Goal 17 defined shoreland, in part as adjacent areas of geologic instability where the geologic instability is related to or will impact a coastal water body, and areas of significant shoreland and wetland biological habitats whose habitat quality is primarily derived from or related to the association with coastal waters.

In implementing Goal 17, the city adopted Ordinance 94-29 in 1994, which established the city's current WO zone, which is applicable to the claimant's property. Through the city's wetland lot-of-record provisions, the WO zone does not permit the construction of a single-family dwelling on any of the six lots listed in the claim.

The claimant's property is also zoned FHO as required by Goal 7 (Natural Hazards). The Cannon Beach Comprehensive Plan Chapter 17.50, Development Requirements for Potential Geologic Hazard Areas, and Land Use Ordinance Section 17.38.010, Flood Hazard Overlay (FHO) zone implement the requirements of Goal 7. The purpose of the FHO zone, as applied to the subject property, is to minimize building hazards and to minimize threats to life and property that may arise from inappropriate construction in flood hazard zones.

The claimant's family acquired the subject property in 1967, prior to the adoption of the statewide planning goals and their implementing regulations.

### **Conclusions**

The state land use regulations established by Goal 17 and provisions applicable to land zoned coastal shorelands were enacted or adopted after the claimant's family acquired the subject property in 1967, and regulate the development of residential land on the subject property. However, as explained below in Section V.(4), the state land use regulations that restrict the claimant's use of the subject property were adopted to restrict or prohibit activities for the protection of public health and safety and therefore, are exempt under ORS 197.352(3)(B).

### **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>5</sup> Goal 17 was adopted in 1976 and became effective on June 7, 1977. The Goal 17 inventory requirements defined the shoreland planning wherein the subject property is located. The Goal 17 comprehensive plan requirements prescribed coastal shoreland uses for the different types of coastal shorelands, as noted in the text of this report.

<sup>6</sup> A. Inventories:

1. Hazard areas, including at least:
  - (a) Areas the use of which may result in significant hydraulic alteration to other lands or water bodies;
  - (b) Areas of geological instability in, or adjacent to shorelines; and
  - (c) The 100-year floodplain.

## **Findings of Fact**

The claim includes an estimate of \$1,265,000 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 property's value.

## **Conclusions**

As explained in Section V.(1) of this report, Robert Neikes is the claimant whose family member acquired the subject property in 1967. Under ORS 197.352, the claimant is 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 claimant's family acquired the subject property restrict the claimant's desired use of the property. However, as explained in Section V.(4), the state land use regulations adopted after the claimant's family acquired the subject property are exempt under ORS 197.352 (3)(B). Therefore, the claimant is not entitled to compensation under ORS 197.352(1).

### **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 the relief otherwise provided in ORS 197.352(1). Specifically, ORS 197.352(3)(B) provides an exemption for laws that restrict or prohibit activities "for the protection of public health and safety, such as fire and building code, health and sanitation regulations, solid or hazardous waste regulations, and pollution control regulations."

The claim is based on state land use regulations that restrict the use of the subject property, including applicable provisions Goals 7 and 17, which the city has implemented through its WO and FHO zones. These land use regulations were enacted or adopted after the claimant's family acquired the subject property and restrict or prohibit activities for the protection of public health and safety.

## **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 February 17, 1967. As a result, these laws are not exempt under ORS 197.352(3)(E). However, the provisions of the City of Cannon Beach Comprehensive Plan and Zoning Ordinance, which implement Goals 7 and 17, restrict or prohibit activities for the purpose of protecting public health and safety. Therefore these laws are exempt under ORS 197.352(3)(B), which exempts laws that prohibit or restrict activities for the protection of public health and safety.

## **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 relative to uses permitted when the claimant's family acquired the subject property in 1967. However, the state land use regulations that restrict the use of the subject property are exempt under ORS 197.352(3)(B) because they restrict or prohibit activities for the protection of public health and safety. Therefore, these regulations do not provide a basis for compensation.

### **Conclusions**

Based on the record before the department, the claimant, Robert Neikes, has not established that he is entitled to relief under ORS 197.352(1), as a result of land use regulations enforced by the Commission or the department because the state regulations that restrict the claimant's use of the subject property prohibit or restrict activities for the protection of public health and safety and therefore, are exempt from ORS 197.352(1) under ORS 197.352(3)(B). Therefore, the department recommends that this claim be denied.

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

The department issued its draft staff report on this claim on March 30, 2007. 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.