



# Oregon

Theodore R. Kulongoski, Governor

## Department of Land Conservation and Development

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September 4, 2007

To: Interested Persons  
From: Cora R. Parker, Acting Director



*Re: Ballot Measure 37 (ORS 197.352) Claim Number M130831*

*Claimant: Thomas R. Neikes*

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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. M130831  
(BALLOT MEASURE 37) OF )  
Thomas R. Neikes, CLAIMANT )

Claimant: Thomas R. Neikes (the Claimant)

Property: Township 8N, Range 9W, Section 30BD, Tax lot 1300  
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

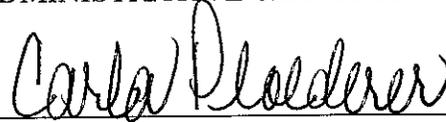
The Claim is denied as to laws administered by DLCD and the Land Conservation and Development Commission (LCDC) for the reasons set forth in the DLCD Report.

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:  
Cora R. Parker, Acting Director

  
Michael Morrissey, Manager  
DLCD Measure 37 Services Division  
Dated this 4<sup>th</sup> day of September, 2007.

FOR THE DEPARTMENT OF  
ADMINISTRATIVE SERVICES:

  
Carla Ploederer, Manager  
DAS, Measure 37 Services Division  
Dated this 4<sup>th</sup> day of September, 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**

September 4, 2007

**STATE CLAIM NUMBER:** M130831

**NAME OF CLAIMANT:** Thomas R. Neikes

**MAILING ADDRESS:** PO Box 804  
Astoria, Oregon 97103

**PROPERTY IDENTIFICATION:** Township 8N, Range 9W, Section 30BD  
Tax lot 1300  
Clatsop County

**DATE RECEIVED BY DAS:** November 17, 2006

**DEADLINE FOR FINAL ACTION:<sup>1</sup>** May 10, 2008

**I. SUMMARY OF CLAIM**

The claimant, Thomas Neikes, seeks compensation in the amount of \$25,000 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 develop a commercial building more than 4,000 square feet.<sup>2</sup> The subject property is located at 92310 Riekkola Road, near Astoria, 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 claimant's desired use was prohibited under the laws in effect when the claimant acquired the property in 2000. No state land use regulations restrict the claimant's use of the property relative to uses

<sup>1</sup> ORS 197.352, as originally enacted, required that final action on claims made under Measure 37 be made within 180 days of the date the claim was filed. In response to the large volume of claims filed in late 2006, the Oregon legislature passed House Bill 3546, which became effective on May 10, 2007. This legislation increased the amount of time state and local governments have to take final action on Measure 37 claims filed on or after November 1, 2006, by 360 days, to a total of 540 days.

<sup>2</sup> The claimant also requests that the department remove the subject property's Rural Community Commercial zoning and reinstate the property's previous General Commercial zoning status as of the date he acquired the property in 2000 in order to allow him to develop a building more than 4,000 square feet. However, ORS 197.352 does not allow what the claimant requests. By its terms, ORS 197.352 does not remove zoning or eliminate land use regulations. Rather, it provides that "the governing body responsible for enacting the land use regulation may modify, remove, or not to apply [*sic*] the land use regulation or land use regulations to allow the owner to use the property for a use permitted at the time the owner acquired the property."

permitted when he acquired it, with the effect of reducing the property's fair market value. (See the complete recommendation in Section VI. of this report).

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

#### **Comments Received**

On June 12, 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, one written comment was received in response to the 10-day notice

The comment is relevant to whether the laws that are the basis for the claim are exempt under ORS 197.352(3). The comment has been considered by the department in preparing this report. (See the comment letter 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 November 17, 2006, for processing under OAR 125, division 145. The claim identifies Clatsop County's Rural Community Commercial (RCC) zoning as the basis for the claim. Only laws that were enacted or adopted prior to December 2, 2004, are the basis for this claim.

#### **Conclusions**

The claim has been submitted within two years of the effective date of Measure 37 (December 2, 2004), based on land use regulations enacted or adopted prior to December 2, 2004, and is therefore timely filed.

## V. ANALYSIS OF CLAIM

### 1. Ownership

ORS 197.352 provides for payment of compensation or relief from specific laws for “owners” as that term is defined in ORS 197.352. ORS 197.352(11)(C) defines “owner” as “the present owner of the property, or any interest therein.”

### Findings of Fact

The claimant, Thomas Neikes, acquired the subject property on January 7, 2000, as reflected by a bargain and sale deed included with the claim. The Clatsop County Assessor’s Office confirms the claimant’s current ownership of the subject property.

### Conclusions

The claimant, Thomas Neikes, is an “owner” of the subject property as that term is defined by ORS 197.352(11)(C), as of January 7, 2000.

### 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.

### Findings of Fact

The claim indicates that the claimant desires to develop a commercial building more than 4,000 square feet and that the current zoning prevents the desired use.

The claim is based on the applicable provisions of state law that allow counties to adopt individual plan and zone designations (e.g., residential, commercial, industrial, public) for land in designated rural communities. The claimant’s property is zoned Rural Community Commercial by Clatsop County as required by Statewide Planning Goals 11 (Public Facilities and Services) and 14 (Urbanization), in accordance with ORS 197 and OAR 660, division 22.

Goal 11, which became effective on January 25, 1975, generally prohibits urban levels of public facilities and services on lands that are outside an Urban Growth Boundary (UGB). Goal 11 and its implementing rules have two components: one that prohibits an owner from developing or utilizing urban-level facilities or services, and another that prohibits service providers from extending their facilities to serve property outside a UGB, unless a Goal 2 exception has been acknowledged. The claimant’s property is zoned for rural commercial use because the county justified exceptions to Goals 3, 4 and 11 to allow non-resource uses and to allow public facilities and services for the property.

Goal 14, which also became effective on January 25, 1975, generally requires that land outside of urban growth boundaries be used for rural uses. OAR 660-022-0030(4) and (10) became

effective on December 5, 1994, and implement Goal 14 by limiting uses within rural unincorporated communities. OAR 660-022-0030(4)(b) limits commercial uses to “small-scale, low-impact uses.” OAR 660-022-0030(10) further defines a small-scale, low impact commercial use as, “one which takes place . . . in any other type of unincorporated community in a building or buildings not exceeding 4,000 square feet of floor space.”

The claimant acquired the subject property on January 7, 2000, after the adoption of the statewide goals and their implementing statutes and regulations. At the time the claimant acquired the subject property, it was zoned General Commercial by Clatsop County. The county subsequently re-zoned the property to the current Rural Community Commercial zone, which effectively applied the rule limiting a commercial building or buildings to not more than 4,000 square feet.

### **Conclusions**

The current applicable zoning requirements and development standards established by Goals 11 and 14 and provisions in OAR 660, division 22 (as applicable to lands within rural unincorporated communities) were adopted before Thomas Neikes acquired the subject property on January 7, 2000.<sup>3</sup> These land use regulations limit commercial uses in rural unincorporated communities to small-scale, low impact uses and do not allow a commercial building or buildings more than 4,000 square feet on the subject property. Laws enacted or adopted since the claimant acquired the subject property on January 7, 2000, do not restrict the claimant’s desired use of the property relative to when the claimant acquired it in 2000.

### **3. Effect of Regulations on Fair Market Value**

In order to establish a valid claim, ORS 197.352(1) requires that the land use regulation(s) (described in Section V.(2) of this report) must have “the effect of reducing the fair market value of the property, or any interest therein.”

### **Findings of Fact**

The claim includes an estimate of \$25,000 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 subject property’s value.

### **Conclusions**

As explained in Section V.(1) of this report, Thomas Neikes is the claimant, who acquired the subject property on January 7, 2000. No state laws enacted or adopted since the claimant acquired the subject property restrict the claimant’s desired use of the property relative to the uses allowed on January 7, 2000. Therefore, the fair market value of the subject property has not been reduced as a result of land use regulations enforced by the Land Conservation and Development Commission (the Commission) or the department.

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<sup>3</sup> OAR 660, division 22, was amended in 2003; however, those amendments are unrelated to this claim.

#### **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 claimant's desired use of the subject property, including relevant provisions of Goals 11 and 14, which Clatsop County has implemented through its Rural Community Commercial zone. The provisions of Goals 11 and 14 that restrict the claimant's desired use of the subject property were all in effect when the claimant acquired the property on January 7, 2000. The claim does not identify any state land use regulations enacted or adopted since the claimant acquired the subject property that restrict the use of the property relative to what would have been allowed when he acquired it on January 7, 2000.

#### **Conclusions**

All of the state land use regulations that restrict the claimant's desired use of the subject property were in effect when the claimant acquired the property. Therefore, these state land use regulations are exempt under ORS 197.352(3)(E), which exempts laws in effect when the claimant acquired the subject 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 claimant's desired use of the subject property relative to what was permitted when the claimant acquired it on January 7, 2000, and do not reduce the fair market value of the property. All state laws restricting the use of the subject property are exempt under ORS 197.352(3)(E).

#### **Conclusions**

Based on the record and the foregoing findings and conclusions, the claimant 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 claimant's desired use of the property was

prohibited under the laws in effect when he acquired the property. 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 July 20, 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.