



# Oregon

Theodore R. Kulongoski, Governor

## Department of Land Conservation and Development

635 Capitol Street NE, Suite 150

Salem, Oregon 97301-2524

Phone: (503) 373-0050

First Floor/Coastal Fax: (503) 378-6033

Second Floor/Director's Office Fax: (503) 378-5518

Third Floor/Measure 37 Fax: (503) 378-5318

Web Address: <http://www.oregon.gov/LCD>

November 6, 2007

To: Interested Persons

From: Cora R. Parker, Acting Director



*Re: Ballot Measure 37 (ORS 197.352) Claim Number M131389*

*Claimants: Don and Janet Nunmaker*

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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. M131389  
(BALLOT MEASURE 37) OF )  
Don and Janet Nunamaker, CLAIMANTS )

Claimants: Don and Janet Nunamaker (the Claimant)

Property: Township 2N, Range 10E, Section 2A, Tax lot 1800, Hood River 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 for the 3.99-acre portion of the subject property as to laws administered by DLCD and the Land Conservation and Development Commission (LCDC) for the reasons set forth in the DLCD Report.

The Claim is approved for the remaining 0.23-acre portion of the subject property 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 Don and Janet Nunamaker's division of a 3.99-acre portion of the subject property into four parcels: applicable provisions of Goals 3 and 14, ORS 215 and OAR 660, division 33. These laws will not apply to the claimants only to the extent necessary to allow them to use the 3.99-acre portion of the subject property for the use described in this report, and only to the extent that use was permitted when they acquired that portion of the property on February 25, 1972.

2. The action by the State of Oregon provides the state's authorization to the claimants to use the 3.99-acre portion of the subject property for the use described in this report, subject to the standards in effect on February 25, 1972.

3. To the extent that any law, order, deed, agreement or other legally enforceable public or private requirement provides that the 3.99-acre portion of 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 3.99-acre portion of the subject property imposed by private parties.


4. Any use of the 3.99-acre portion 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 3.99-acre portion of 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 3.99-acre portion of the subject property by the claimants.

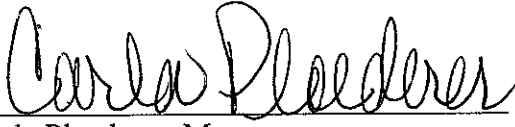
6. Nothing in this report or the state's final order for this claim constitutes any determination of ownership by the State of Oregon as to submerged or submersible lands, or as to public rights to the use of waters of the state.

This Order is entered by the Manager for the Measure 37 Services Division 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 Manager of the Measure 37 Services Unit 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:  
Cora R. Parker, Acting Director

  
Michael Morrissey, Manager  
DLCD, Measure 37 Services Division  
Dated this 6<sup>th</sup> day of November, 2007.

FOR the DEPARTMENT OF  
ADMINISTRATIVE SERVICES:

  
Carla Ploederer, Manager  
DAS, Measure 37 Services Unit  
Dated this 6<sup>th</sup> day of November, 2007.

## **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 6, 2007

**STATE CLAIM NUMBER:** M131389

**NAMES OF CLAIMANTS:** Don and Janet Nunamaker

**MAILING ADDRESS:** 3501 Brookside Drive  
Hood River, Oregon 97031

**PROPERTY IDENTIFICATION:** Township 2N, Range 10E, Section 2A  
Tax lot 1800  
Hood River County

**DATE RECEIVED BY DAS:** November 28, 2006

**DEADLINE FOR FINAL ACTION:<sup>1</sup>** May 21, 2008

**I. SUMMARY OF CLAIM**

The claimants, Don and Janet Nunamaker, seek compensation in the amount of \$450,000 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 claimants desire compensation or the right to divide the 4.22-acre subject property into four parcels. The subject property is located on Brookside Drive, near Hood River, in Hood River 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 in part. 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 Don and Janet Nunamaker's division of a 3.99-acre portion of the subject property into four parcels: applicable provisions of Statewide Planning Goals 3 (Agricultural Lands) and 14 (Urbanization), ORS 215 and Oregon Administrative Rules (OAR) 660, division 33. These laws will not apply to the claimants only to the extent necessary to allow them to use the 3.99-

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<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.

acre portion of the subject property for the use described in this report, and only to the extent that use was permitted when they acquired that portion of the property on February 25, 1972.

The department has further determined that the claim is not valid as to a 0.23-acre portion of the subject property because the claimants' desired use of that portion of the subject property was prohibited under the laws in effect when the claimants acquired it in 1996. (See the complete recommendation in Section VI. of this report.)

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

#### **Comments Received**

On July 16, 2007, 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, no written comments were received in response to the 15-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 November 28, 2006, for processing under OAR 125, division 145. The claim identifies Hood River County zoning ordinances 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, Don and Janet Nunamaker, acquired a 3.99-acre portion of the subject property on February 25, 1972, as reflected by a warranty deed included with the claim. Don and Janet Nunamaker acquired a 0.23-acre portion of the subject property through a lot line adjustment on June 28, 1996, as reflected by a warranty deed provided by Hood River County’s Planning Department. On June 1, 1994, the claimants transferred the subject property to a revocable trust, the Nunamaker Family Trust, as reflected by a trust agreement included with the claim.<sup>2</sup> The Hood River County Assessor’s Office confirms the claimants’ current ownership of the subject property.

### **Conclusions**

The claimants, Don and Janet Nunamaker, are “owners” of the subject property as that term is defined by ORS 197.352(11)(C), as of February 25, 1972, for the 3.99-acre portion of the property and as of June 28, 1996, for the 0.23-acre portion of the property.

### **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 4.22-acre subject property into four parcels, and that the property’s current zoning prevents the desired use.

The claim is based generally on the applicable provisions of state law that require Exclusive Farm Use (EFU) zoning and restrict uses on EFU-zoned land. The claimants’ property is zoned EFU by Hood River 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>3</sup> Goal 3 became effective on January 25, 1975, and required that agricultural lands as defined by Goal 3 be zoned EFU pursuant to ORS 215.

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<sup>2</sup> Transfer of property to a revocable trust does not result in a change in ownership for purposes of ORS 197.352.

<sup>3</sup> The claimants’ property is “agricultural land” because it contains Natural Resources Conservation Service Class I–IV soils.

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.

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.

Goal 14, which became effective on January 25, 1975, would likely apply to the division of the claimants' property into parcels less than two acres. Goal 14 generally requires that land outside of urban growth boundaries be used for rural uses.

The claimants acquired a 3.99-acre portion of the subject property on February 25, 1972, prior to the adoption of the statewide planning goals and their implementing statutes and regulations. At that time, the 3.99-acre portion of the subject property was zoned A-2 by Hood River County, which established a minimum lot size of 7,500 square feet if served by a public sanitary sewer system.

When the claimants acquired the 0.23-acre portion of the subject property on June 28, 1996, it was subject to the state land use regulations currently in effect, as described above.

### **Conclusions**

The current zoning requirements and minimum lot size established by applicable provisions of Goals 3 and 14, ORS 215 and OAR 660, division 33, were all enacted or adopted after the claimants acquired the 3.99-acre portion of the subject property in 1972 and do not allow the claimants' desired division of the property. These laws restrict the use of the subject property relative to the uses allowed when the claimants acquired the property. Laws enacted or adopted since the claimants acquired the 0.23-acre portion of the subject property in 1996 do not restrict the claimants' desired use of that portion of the subject property relative to when they acquired it in 1996.

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 use that the claimants have identified. There may be other laws that currently apply to the claimants' use of the subject 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 the subject 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."

## **Findings of Fact**

The claim includes an estimate of \$450,000 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.(1) of this report, the claimants are Don and Janet Nunamaker who acquired a 3.99-acre portion of the subject property on February 25, 1972, and a 0.23-acre portion of the subject property on June 28, 1996. The claimants are not entitled to relief under ORS 197.352 for the 0.23-acre portion of the property because no state laws enacted or adopted since the claimants acquired that portion of the property restrict the claimants' desired use of that portion of the property relative to the uses allowed in 1996 with the effect of reducing the property's fair market value.

Under ORS 197.352, the claimants are due compensation for land use regulations that restrict the use of the 3.99-acre portion 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 enacted or adopted since the claimants acquired the 3.99-acre portion of 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 property is a reduction of \$450,000.

Without an appraisal or other documentation, 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 3.99-acre portion 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(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 applicable provisions of Goals 3 and 14, ORS 215 and OAR 660, division 33, which Hood River County has implemented through its current EFU zone. All of these land use regulations were enacted or adopted after the claimants acquired the 3.99-acre portion of the subject property. All of these land use regulations were in effect when the claimants acquired the 0.23-acre portion of the subject property.

## **Conclusions**

Without a specific development proposal for the subject 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 none of the general statutory, goal and rule restrictions on division of the 3.99-acre portion of the subject property were in effect when the claimants acquired it in 1972. As a result, these laws are not exempt under ORS 197.352(3)(E).

All of the state land use regulations that restrict the claimants' desired use of the 0.23-acre portion of the subject property were in effect when they acquired that portion of the subject property. Therefore, these state land use regulations are exempt under ORS 197.352(3)(E), which exempts laws in effect when the claimants acquired the 0.23-acre portion of the subject property.

Laws in effect when the claimants acquired the 3.99-acre portion of the subject property are 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 3.99-acre portion of the subject 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 the subject 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 subject 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 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 laws that restrict the use of the subject 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 subject 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 0.23-acre portion of the subject property relative to the uses permitted when they acquired that portion of the property in 1996. The department has further determined laws enforced by the Commission or the department restrict the claimants desired use of the 3.99-acre portion 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 \$450,000. 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 3.99-acre portion of the subject property was allowed under the standards in effect when they acquired that portion. 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 3.99-acre portion 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 Don and Janet Nunamaker to use the 3.99-acre portion of the subject property for a use permitted at the time they acquired the property on February 25, 1972.

### **Conclusions**

Based on the record and foregoing findings and conclusions, the claimants are not entitled to relief for the 0.23-acre portion of the subject property because no state land use regulations enforced by the Commission or the department restrict their desired use of that portion of subject property relative to uses permitted when they acquired that portion in 1996. Therefore the department recommends that the claim be denied as to the 0.23-acre portion of the subject property.

The department otherwise recommends that the claim be approved, as to the 3.99-acre portion of the subject property, 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 Don and Janet Nunamaker's division of a 3.99-acre portion of the subject property into four parcels: applicable provisions of Goals 3 and 14, ORS 215 and OAR 660, division 33. These laws will not apply to the claimants only to the extent necessary to allow them to use the 3.99-acre portion of the subject property for the use described in this report, and only to the extent that use was permitted when they acquired that portion of the property on February 25, 1972.
2. The action by the State of Oregon provides the state's authorization to the claimants to use the 3.99-acre portion of the subject property for the use described in this report, subject to the standards in effect on February 25, 1972.
3. To the extent that any law, order, deed, agreement or other legally enforceable public or private requirement provides that the 3.99-acre portion of 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 3.99-acre portion of the subject property imposed by private parties.

4. Any use of the 3.99-acre portion 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 3.99-acre portion of 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 3.99-acre portion of the subject property by the claimants.

6. Nothing in this report or the state's final order for this claim constitutes any determination of ownership by the State of Oregon as to submerged or submersible lands, or as to public rights to the use of waters of the state.

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

The department issued its draft staff report on this claim on October 4, 2007. 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. Comments received have been taken into account by the department in the issuance of this final report.