

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. M121423
(BALLOT MEASURE 37) OF)	
David and Dawn Robanske, CLAIMANTS)	

Claimants: David and Dawn Robanske (the Claimants)

Property: Township 4S, Range 1W, Section 16C, Tax lots 500, 700 and 800,
Marion 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 David Robanske's development of a dwelling on tax lots 500 and 800 or to Dawn Robanske's development of a dwelling on tax lot 700: applicable provisions of Goal 3, ORS 215 and OAR 660, division 33, enacted or adopted after August 24, 1976. These laws will not apply to David Robanske only to the extent necessary to allow him to use tax lots 500 and 800 for the use described in this report, and only to the extent that use was permitted when he acquired these tax lots on August 24, 1976. These laws will not apply to Dawn Robanske only to the extent necessary to allow her to use tax lot 700 for the use described in this report, and only to the extent that use was permitted when she acquired tax lot 700 on August 24, 1976.
2. The action by the State of Oregon provides the state's authorization to David Robanske to use tax lots 500 and 800 and to Dawn Robanske to use tax lot 700 for the use described in this report, subject to the standards in effect on August 24, 1976. On that date, the property was subject to applicable provisions of Goal 3 and ORS 215 then in effect.

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

4. Any use 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 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 subject property by the claimants.

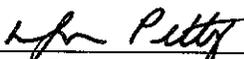
This Order is entered by the Director of the DLCD as a final order of DLCD and the Land Conservation and Development Commission under ORS 197.352, OAR 660-002-0010(8), and OAR 125, division 145, and by the Deputy Administrator for the State Services Division of the DAS as a final order of DAS under ORS 197.352, OAR 125, division 145, and ORS 293.

FOR DLCD AND THE LAND CONSERVATION
AND DEVELOPMENT COMMISSION:



Lane Shetterly, Director
DLCD
Dated this 25th day of May, 2006.

FOR the DEPARTMENT OF ADMINISTRATIVE
SERVICES:



Dugan Petty, Deputy Administrator
DAS, State Services Division
Dated this 25th day of May, 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 197.352¹, 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."

¹ By order of the Marion County Circuit Court, "all time lines under Measure 37 [were] suspended indefinitely" on October 25, 2005. This suspension was lifted on March 13, 2006 by the court. As a result, a period of 139 days (the number of days the time lines were suspended) has been added to the 180-day time period under ORS 197.352(6) for claims that were pending with the state on October 25, 2005.

ORS 197.352 (BALLOT MEASURE 37) CLAIM FOR COMPENSATION

**OREGON DEPARTMENT OF LAND CONSERVATION AND DEVELOPMENT
Final Staff Report and Recommendation**

May 25, 2006

STATE CLAIM NUMBER: M121423

NAMES OF CLAIMANTS: David and Dawn Robanske

MAILING ADDRESS: None provided

PROPERTY IDENTIFICATION: Township 4S, Range 1W, Section 16C
Tax lots 500, 700 and 800
Marion County

OTHER CONTACT INFORMATION: Arusi Loprinzi
Schwabe, Williamson & Wyatt
1211 Southwest Fifth Avenue
Suite 1900
Portland, Oregon 97204

DATE RECEIVED BY DAS: July 15, 2005

180-DAY DEADLINE: May 30, 2006¹

I. SUMMARY OF CLAIM

The claimants, David and Dawn Robanske, 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 develop a single-family dwelling on each of the three subject tax lots. No street address was provided for the subject property, which is located near Donald, in Marion County, at the geographic coordinates listed above. (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 David Robanske's development of a dwelling on tax lots 500 and 800,

¹ This date reflects 180 days from the date the claim was submitted, as extended by the 139 days that all timelines under Measure 37 were suspended during the pendency of *MacPherson v. Dept. of Admin. Svcs.*, 340 Or 117 (2006).

and to Dawn Robanske's development of a dwelling on tax lot 700: applicable provisions of Statewide Planning Goal 3 (Agricultural Lands), ORS 215 and Oregon Administrative Rules (OAR) 660, division 33, enacted or adopted after August 24, 1976. These laws will not apply to David Robanske only to the extent necessary to allow him to use tax lots 500 and 800 for the use described in this report, and only to the extent that use was permitted when he acquired these tax lots on August 24, 1976. These laws will not apply to Dawn Robanske only to the extent necessary to allow her to use tax lot 700 for the use described in this report, and only to the extent that use was permitted when she acquired tax lot 700 on August 24, 1976.

The department has further determined that David Robanske's claim regarding tax lot 700 and Dawn Robanske's claim regarding tax lots 500 and 800 are not valid, because the claimants have not established that David Robanske is an owner of tax lot 700 or that Dawn Robanske is an owner of tax lots 500 and 800. (See the complete recommendation in Section VI. of this report.)

III. COMMENTS ON THE CLAIM

Comments Received

On August 18, 2005, 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, one written comment was received in response to the 10-day notice.

The comment does 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 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 July 15, 2005, for processing under OAR 125, division 145. The claim identifies provisions of 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

David Robanske acquired tax lots 500 and 800 on August 24, 1976, and Dawn Robanske acquired tax lot 700 on August 24, 1976, as reflected by bargain and sale deeds provided by the Marion County Assessor’s Office. The Marion County Assessor’s Office confirms David Robanske’s current ownership of tax lots 500 and 800 and Dawn Robanske’s current ownership of tax lot 700.²

Conclusions

David Robanske is an “owner” of tax lots 500 and 800, and Dawn Robanske is an “owner” of tax lot 700, as that term is defined by ORS 197.352(11)(C), as of August 24, 1976. The claimants have not established that David Robanske is an owner of tax lot 700 or that Dawn Robanske is an owner of tax lots 500 and 800.

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 acquired the property.

² Although the claimants assert joint ownership of all three tax lots, they did not submit any documentation to substantiate that David Robanske is an owner of tax lot 700 or that Dawn Robanske is an owner of tax lots 500 and 800. Ownership information obtained from the Marion County Assessor’s Office indicates David Robanske does not own tax lot 700, and Dawn Robanske does not own tax lots 500 and 800.

Findings of Fact

The claim indicates the claimants desire to develop a dwelling on each of the three subject tax lots and cites numerous laws asserted to restrict that desired use.³

The claim is based generally on Marion County's current Exclusive Farm Use (EFU) zone and the applicable provisions of state law that require such zoning. The subject property is zoned EFU 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 3.⁴ 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 215.284 and OAR 660, division 33, enacted or adopted pursuant to Goal 3, establish standards for the development of dwellings on existing or proposed parcels on that land.

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.)

David Robanske acquired tax lots 500 and 800 and Dawn Robanske acquired tax lot 700 on August 24, 1976, after the adoption of the statewide planning goals, but before the Commission acknowledged Marion County's land use regulations to be in compliance with the statewide planning goals pursuant to ORS 197.250 and 197.251. Because the Commission had not acknowledged the county's plan and land use regulations when the claimants acquired the subject property on August 24, 1976, the statewide planning goals, and Goal 3 in particular, applied directly to the claimants' property when they acquired it.⁵

³ The claimants have summarily cited numerous state laws as applicable to this claim but do not establish how each of the laws either applies to the subject property or restricts its use in a manner that reduces its fair market value. On their face, most of the regulations generally cited in the claim either do not apply to the subject property or do not restrict its use. 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.

⁴ The claimants' property is "agricultural land" because it contains Natural Resources Conservation Service Class I-IV soils.

⁵ The statewide planning goals became effective on January 25, 1975, and were applicable to legislative land use decisions and some quasi-judicial land use decisions prior to the Commission's acknowledgment of each county's comprehensive plan and implementing regulations. *Perkins v. City of Rajneeshpuram*, 300 Or 1 (1985); *Alexanderson v. Polk County*, 289 Or 427, rev. den 290 Or 137 (1980); *Sunnyside Neighborhood Assn. v. Clackamas County*, 280 Or 3 (1977); *Jurgenson v. Union County*, 42 Or App 505 (1979); and *1000 Friends of Oregon v. Benton County*, 32 Or App 413 (1978). After the county's plan and land use regulations were acknowledged by the Commission, the statewide planning goals and implementing rules no longer applied directly to such local land use decisions. *Byrd v. Stringer*, 295 Or 311 (1983). However, statutory requirements continue to apply, and insofar as the state and local provisions are materially the same, the local provisions must be interpreted consistent with the substance of the goals and implementing rules. *Forster v. Polk County*, 115 Or App 475 (1992) and *Kenagy v. Benton County*, 115 Or App 131 (1992).

As adopted on January 25, 1975, Goal 3 required that agricultural land be preserved and zoned for EFU pursuant to ORS 215. Under the Goal 3 standards in effect on August 24, 1976, farm dwellings were allowed if they were determined to be “customarily provided in conjunction with farm use” under ORS 215.213(1)(e) (1973 edition). Non-farm dwellings were subject to compliance with ORS 215.213(3) (1973 edition).

No information has been presented in the claim to establish that the claimants’ desired development of the subject property for single-family residential use complies with the “commercial” standard for farm parcels under Goal 3 or the standards for non-farm parcels under ORS 215.213 (1973 edition), nor is there any information to establish that the claimants’ desired development of single-family dwellings on the subject property satisfies the standards for farm or non-farm dwellings under ORS 215.213 (1973 edition).

Conclusions

The current zoning requirements and dwelling standards established by Goal 3, ORS 215 and OAR 660, division 33, were all enacted or adopted after David Robanske acquired tax lots 500 and 800 and Dawn Robanske acquired tax lot 700 on August 24, 1976, and do not allow the claimants’ desired development of the subject property. However, the claim does not establish whether or the extent to which the claimants’ desired use of the subject property complies with the standards for development under Goal 3 in effect when David Robanske acquired tax lots 500 and 800, and Dawn Robanske acquired tax lot 700 on August 24, 1976.

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 any land use regulation 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 current regulations. This amount is based on the claimants’ own estimate.

Conclusions

As explained in Section V.(1) of this report, the claimants are, David Robanske who acquired tax lots 500 and 800 and Dawn Robanske who acquired tax lot 700 on August 24, 1976. Under ORS 197.352, the claimants are due compensation for land use regulations that restrict the use of the property in a manner that reduces 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 subject property may restrict the desired development of the property. The claimants estimate the reduction in value due to the restrictions to be \$450,000.

Without an appraisal or other documentation and without verification of whether or the extent to which the claimants' desired use of the subject property was allowed under the standards in effect when they acquired the property, it is not possible to substantiate the specific dollar amount the claimants demand for compensation. Nevertheless, based on the submitted information, the department determines that it is more likely than not 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(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 Goal 3, ORS 215 and OAR 660, division 33, which Marion County has implemented through its current EFU zone. With the exception of provisions of Goal 3 and ORS 215 in effect when the claimants acquired the subject property on August 24, 1976, these land use regulations were not in effect when the claimants acquired the 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 with the exception of provisions of Goal 3 and ORS 215 in effect in 1976, the general statutory, goal and rule restrictions on residential development of the subject property are not exempt under ORS 197.352(3)(E) to the extent they were enacted or adopted after the claimants acquired the property on August 24, 1976. Provisions of Goal 3 and ORS 215 in effect when the claimants acquired the subject property on August 24, 1976, 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 subject 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 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 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 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 current 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 David Robanske's ability to develop a dwelling on tax lots 500 and 800, and Dawn Robanske's ability to develop a dwelling on tax lot 700. The claim asserts that the laws enforced by the Commission or the department reduce the fair market value of the subject property by \$450,000. However, because the claim does not provide an appraisal or other specific documentation establishing how the specified restrictions reduce the fair market value of the subject property, and without verification of 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, a specific amount of compensation cannot be determined. Nevertheless, based on the record for this claim, the department acknowledges that the laws on which the claim is based likely 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 David Robanske to use tax lots 500 and 800 for a use permitted when he acquired them on August 24, 1976, and to allow Dawn Robanske to use tax lot 700 for a use permitted at the time she acquired it on August 24, 1976.

Conclusions

Based on the record before the department, David Robanske has not established that he is entitled to relief as to tax lot 700 under ORS 197.352(1), and Dawn Robanske has not established that she is entitled to relief as to tax lots 500 and 800 under ORS 197.352(1), as a result of land use regulations enforced by the Commission or the department because the claimants are not current owners of these tax lots. Therefore, the department recommends that David Robanske's claim regarding tax lot 700 and Dawn Robanske's claim regarding tax lots 500 and 800 be denied.

Based on the record, the department further recommends that the claim be otherwise 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 David Robanske's development of a dwelling on tax lots 500 and 800 or to Dawn Robanske's development of a dwelling on tax lot 700: applicable provisions of Goal 3, ORS 215 and OAR 660, division 33, enacted or adopted after August 24, 1976. These laws will not apply to David Robanske only to the extent necessary to allow him to use tax lots 500 and 800 for the use described in this report, and only to the extent that use was permitted when he acquired these tax lots on August 24, 1976. These laws will not apply to Dawn Robanske only to the extent necessary to allow her to use tax lot 700 for the use described in this report, and only to the extent that use was permitted when she acquired tax lot 700 on August 24, 1976.
2. The action by the State of Oregon provides the state's authorization to David Robanske to use tax lots 500 and 800 and to Dawn Robanske to use tax lot 700 for the use described in this report, subject to the standards in effect on August 24, 1976. On that date, the property was subject to applicable provisions of Goal 3 and ORS 215 then in effect.
3. To the extent that any law, order, deed, agreement or other legally enforceable public or private requirement provides that 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 subject property imposed by private parties.
4. Any use 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 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 subject property by the claimants.

VII. COMMENTS ON THE DRAFT STAFF REPORT

The department issued its draft staff report on this claim on May 9, 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. Comments received have been taken into account by the department in the issuance of this final report.