

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) AMENDED
COMPENSATION UNDER ORS 197.352) FINAL ORDER
(BALLOT MEASURE 37) OF) CLAIM NO. M118367
James and Carol Silke, CLAIMANTS)

Claimants: James and Carol Silke (the Claimants)

Property: Tax Lot 1800, T.19S, R.12W, Section 25, W.M., Lane County (also known as
83315 Erhart Road, Oregon) (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, subject to Lane County's interpretation of and subject to the provisions of its 1977 "Unzoned Area Development Permit" code to have allowed the 14.29-acres to be divided into parcels less than two acres when the claimants acquired it in 1977 as explained in Section V. (2) of the DLCD Report, and subject to the following terms:

1. In lieu of just compensation, the State of Oregon will not apply the requirements of the following law enforced by the Commission or the department to the James and Carol Silkes' division of the 14.29-acre property into parcels less than two acres for residential use: the applicable provisions of OAR 660-004-0040. This rule will not apply to the Silkes' division of the subject property for residential use only to the extent necessary to allow them to use the property as described in this report, and only to the extent that the use was permitted when they acquired the property on November 4, 1977.
2. The action by the State of Oregon provides the state's authorization to James and Carol Silke to use the property subject to the standards in effect on November 4, 1977. On that date, the property was subject to applicable provisions of Statewide Planning Goal 14, which required a minimum parcel size of at least one acre.

3. To the extent that any law, order, deed, agreement or other legally enforceable public or private requirement provides that the 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 ORS 227.160, other permits or authorizations from local, state or federal agencies, and restrictions on the use of the property imposed by private parties.

4. Any use of the 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 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 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 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 13th day of March, 2006.

FOR the DEPARTMENT OF ADMINISTRATIVE
SERVICES:



David Hartwig, Administrator
DAS, State Services Division

Dated this 13th day of March, 2006.

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 293.316:** Judicial review under ORS 293.316 may be obtained by filing a petition for review within 60 days from the service of this order. Judicial review under ORS 293.316 is pursuant to the provisions of ORS 183.482 to the Court of Appeals.
2. **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 and the Circuit Court in the county in which you reside.
3. **A cause of action under ORS 197.352:** A present owner of the property, or any interest therein, may file a cause of action in the Circuit Court for the county where the property is located, if a land use regulation continues to apply to the subject property more than 180 days after the present owner made a written demand for compensation.

(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.”

**BALLOT MEASURE 37 (ORS 197.352)
CLAIM FOR COMPENSATION**

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

March 13, 2006

STATE CLAIM NUMBER: M118367

NAMES OF CLAIMANTS: James and Carol Silke

MAILING ADDRESS: P.O. Box 21505
Eugene, Oregon 97402

IDENTIFICATION OF PROPERTY: 83315 Erhart Road, Florence
Township 19S, Range 12W, Section 25
Tax lot 1800
Lane County

DATE RECEIVED BY DAS: April 28, 2005

180-DAY DEADLINE: March 13, 2006¹

I. CLAIM

The claimants, James and Carol Silke, seek compensation in the amount of \$380,000 for a reduction in fair market value of property as a result of certain land use regulations that are alleged to restrict their use of the property. The claimants desire compensation or the right to divide their 14.29-acre property into one-acre lots for residential use. The property is located at 83315 Erhart Road, Florence in Lane County, Oregon. (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 this claim is valid. Department staff recommends, in lieu of just compensation, that the requirements of the following laws enforced by the Land Conservation and Development Commission (the Commission) or the department not apply to the claimants to allow them to divide the subject property into parcels less than 2 acres for residential use: the applicable provisions of OAR 660-004-0040. This rule will not apply to the claimants' division of the subject property only to the extent necessary to allow them to use the property as described in this report, and only to the extent that use was permitted at the time they acquired the property on November 4, 1977. (See the complete recommendation in Section VI. of this report.)

¹ This date reflects 180 days from the date the claim was submitted as extended by the 139 days enforcement of Measure 37 was suspended during the pendency of the appeal of Macpherson v. Dep't of Admin. Servs., 340 Or ____, 2006 Ore. LEXIS 104 (February 21, 2006).

III. COMMENTS RECEIVED

On May 27, 2005, pursuant to OAR 125-145-0080, the Oregon Department of Administrative Services (DAS) provided written notice to owners of surrounding properties. According to DAS, one comment was received, evidence or information was received in response to the 10-day notice.²

The comment is relevant to whether a state law restricts the claimant's use of the property; whether the restriction of the claimant's use of the property reduces the fair market value of the property and whether a state agency has the authority to waive state statutes. The comments have been considered by the department in preparing this report (See 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 the Measure (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 the Measure (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 April 28, 2005, for processing under OAR 125, division 145. The claim identifies the two acre density limitation in OAR 660-004-0040 as the state law that restricts the use of the property as the basis for the claim. Only laws that were enacted prior to December 2, 2004, the effective date of Measure 37, are the basis for this claim. (See citations of administrative rule history of the Oregon Administrative Rules.)

Conclusions

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

² The 10-day notice period was suspended for 139 days during the pendency of the *Macpherson v. Dep't of Admin. Servs.*, 340 Or ____, 2006 Ore. LEXIS 104 (February 21, 2006), which suspended all Measure 37 deadlines.

V. ANALYSIS OF CLAIM

1. Ownership

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

Findings of Fact

According to the record, James and Carol Silke, acquired the subject property by a Land Sales Contract on November 4, 1977 (see copy in the department’s file). A current tax statement has been provided which demonstrates that James and Carol Silke remain current owners of the property.

Conclusions

The claimants, James and Carol Silke, are “owners” of the subject property as that term is defined in ORS 197.352(11)(C) as of November 4, 1977.

2. The Laws that are the Basis for the 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 states that the claimants seek “compensation/relief from all regulations of the Land Conservation and Development Commission (LCDC) in OAR 660 Chapter 660 that post-date their date of acquisition. In particular, they seek compensation/relief from the rules adopted on June 9, 2000 (effective date October 4, 2000) setting a 2-acre minimum size for land divisions on rural lands. Those rules are found at OAR 660-004-0040.”

OAR 660-004-0040 became effective on October 4, 2000 and is an interpretive rule under Statewide Planning Goal 14 (Urbanization). Goal 14 became effective on January 25, 1975. Statewide Planning Goal 14 generally requires that land outside urban growth boundaries be used for rural uses.

As interpreted by the courts and the Commission, Goal 14 generally prohibits residential development outside of an urban growth boundary where lot or parcel sizes are less than two-acres. (See, e.g. *1000 Friends of Oregon v. LCDC (Curry County)*, 301 Or 447 (1986); *DLCD v. Klamath County*, 38 Or LUBA 769 (2000). As a result of a 1986 *Curry County Oregon* Supreme Court decision, the Commission amended Statewide Planning Goal 14 (Urbanization) and adopted OAR 660-004-0040, establishing rules for rural residential development outside

urban growth boundaries, which became effective on October 4, 2000.³ The rule provides among other things that if, on October 4, 2000, a County Rural Residential (RR) zone specifies a minimum lot size smaller than two-acres, the area of any new lot or parcel shall equal or exceed two-acres. OAR 660-004-0040(5)(b) and (7)(d). A lot or parcel smaller than two acres may be created only if an exception to Goal 14 is taken. OAR 660-004-0040(7)(a).

The claimant's property is currently zoned Rural Residential (RR-1) with a one-acre minimum lot size. As a result of OAR 660-004-0040, the subject property cannot be divided into lots or parcels less than two acres in size.

When the claimants acquired the subject property in 1977, it was not zoned by Lane County but was subject to the applicable provisions of the County's "Unzoned Area Development Permit." These provisions are in question and have not yet been conclusively interpreted by Lane County. They either allow for the creation of new five-acre parcels or parcels "determined by water supply and sewage facility requirements in which case width and depth requirements shall be based on the closest applicable requirements of the table." (See Lane County Code Section 9.700(29) and Sections 13.015 and 13.070 effective in 1977 in the department's claim file).⁴

Further, when the claimants acquired the subject property in 1977, the "Unzoned Area Development Permit" provisions were not acknowledged by the Commission under the standards for state approval of local comprehensive plans and land use regulations pursuant to ORS 197.250 and 197.251. Because the Commission had not acknowledged Lane County's plan and land use regulations when the claimants acquired the property in 1977⁵, the Statewide Planning Goals applied directly to the property.⁶

As explained above, Statewide Planning Goal 14 (Urbanization) required that local comprehensive plans identify and separate urbanizable land from rural land. For properties

³ Before that time, Goal 14 had been held to prohibit residential development in areas outside of urban growth boundaries at densities between one and five-acres per lot. See *DLCD v. Klamath County*, 38 Or LUBA 769 (2000).

⁴ Section 13.015(1)(d) appears to classify the claimant's property as a "Rural Area" and thus subject to the 5 acre minimum specified in the table under Section 13.070

⁵ Commission Denial Order dated February 26, 1981 for rural and coastal areas; Acknowledgement Order dated October 3, 1984 (84-ACK-201), affirmed in part and remanded by Oregon Supreme Court, including exception areas under Goal 2, (see *1000 Friends of Oregon v. LCDC (Lane County)*, 305 Or 384 (1988)). Also see Continuance Order 88-CONT-380, dated June 2, 1988, for clarification of the Commission review of exception areas.

⁶The 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 the County's plan and implementing regulations. (*Sunnyside Neighborhood Assn. v. Clackamas County*, 280 Or 3 (1977), *1000 Friends of Oregon v. Benton County*, 32 Or App 413 (1978), *Jurgenson v. Union County*, 42 Or App 505 (1979), *Alexanderson v. Polk County*, 289 Or 427, rev. denied, 290 Or 137 (1980) and *Perkins v. City of Rajneeshpuram*, 300 Or 1 (1985)). After the County's plan and land use regulations were acknowledged by Commission, the Statewide Planning Goals and implementing rules no longer directly applied 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 in substance, the applicable rules must be interpreted and applied by the County in making its decision. *Forster v. Polk County*, 115 Or App 475 (1992) and *Kenagy v. Benton County*, 115 Or App 131 (1992).

within close proximity of an urban growth boundary Goal 14 requires a minimum lot size of at least one-acre for the creation of new lots or parcels. (See *Doob v. Josephine*, 32 Or LUBA 364 (1977).⁷ Further, LCDC acknowledged the County's RR-1 zoning to be in compliance with Goal 14.⁸

Accordingly, the claimants' 14.29-acre parcel may have been divided into one-acre parcels when the claimants acquired it in 1977 under one interpretation of Lane County's "Unzoned" code provisions (water and sewer requirements) and the provisions of Goal 14.

Conclusions

The provisions of Lane County's 1977 "Unzoned Area Development Permit" code may have allowed for new parcels based on "water supply and sewage facility requirements," and the general requirement of Goal 14 (Urbanization) as applied to the property. The zoning requirements, minimum lot size and dwelling standards for rural residential lots or parcels established by OAR 660-004-0040 were enacted after the claimants acquired the subject property in 1977, and do not allow the division of the property, thereby currently restricting the use of the property. However, Goal 14, as applied to the subject property under the RR-1 zoning acknowledged by the Commission may have allowed the property to be divided into parcels less than two acres in size. Thus, the current land use regulations applicable to the subject property restrict its use relative to the uses allowed when the claimants acquired the property in 1977.

This report addresses only those state laws that are identified in the claim, or that the department is certain apply to the property based on the uses that the claimants have identified. There may be other laws that currently apply to the claimants' use of the 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 what 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.

3. Effect of Regulations on Fair Market Value

In order to establish a valid claim, ORS 197.352(1) requires that any laws 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."

⁷ The subject property is within one-mile of the City of Dunes City's Urban Growth Boundary.

⁸ See footnote # 2 of this Report.

Findings of Fact

The claim includes an estimate of \$380,000 for the reduction in the property's fair market value due to current regulations. This estimate is based on a marketing analysis conducted by local realtors.⁹ No other information or documentation has been submitted with the claim.

Conclusions

As explained in section V.(2) of this report, depending on how Lane County interprets the provisions of its 1977 "Unzoned Area Development Permit" code, current land use regulations may restrict the use of the subject property relative to the uses allowed when the claimants acquired the property in 1977. If the claimants can not divide the subject property into more parcels under the current two-acre minimum lot size for residential development than they could have when they acquired the property in 1977 (based on "water supply and sewage facility requirements" and Goal 14), the current land use regulations restrict the use of the property and under ORS 197.352, James and Carol Silke are entitled to compensation for land use regulations that restrict the use of the subject property in a manner that reduces its fair market value. Thus, based on the findings and conclusions in Section V.(2), state laws restrict the division of the subject property and residential development. The claimants estimate the reduction in value due to land use restrictions to be \$21,127,000.

Without an appraisal or other documentation it is not possible to determine the specific dollar amount the claimants demand for compensation. Nevertheless, based on the submitted information and depending on how Lane County interprets the provisions of its 1977 "Unzoned Area Development Permit," the department determines that it is more likely than not that some additional development than currently permitted would have been possible in 1977, and that there has been some reduction in the fair market value of the subject property 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 the ORS 197.352.

Findings of Fact

The land use regulations that are the subject of this claim are Goal 14 and OAR 660-004-0040, which set forth the requirements for the creation of new lots or parcels in rural residential areas. Goal 14 was in effect when the claimants acquired the property in 1977. As a result, it is exempt under ORS 197.352(3)(E). The provisions of OAR 660-004-0040 took effect in 2000, after the claimants acquired the property. As a result, that rule is not exempt under ORS 197.352(3)(E).

⁹ The basis for this estimate is the determination that ten buildable lots (assuming a proposed plat with septic approvals, paved road, water to each lot line, together with power and telephone), would have a fair market value of about \$1,005,000. Under current law requiring a two-acre minimum lot size, six buildable lots could be created, given topographical constraints, with a fair market value of about \$625,000 ($\$1,005,000 - \$625,000 = \$380,000$).

Conclusions

Laws in effect when the claimants acquired the property are exempt under ORS 197.352(3)(E) and will continue to apply to the claimants' use of the property. Goal 14 was enacted before the claimants acquired an interest in the property, and as a result is exempt from ORS 197.352(3)(E). However, because there are no state laws that restrict the claimants' use of the subject property relative to uses permitted when the claimants acquired the property, the exemption provisions of ORS 197.352(3)(E) are not applicable to this claim.

VI. FORM OF RELIEF

ORS 197.352(1) provides for payment of compensation to an owner of private real property if the Commission or department has enforced a law that restricts 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 to allow the present owner to carry out a use of the property allowed at the time the present owner acquired the property. The Commission has by rule directed that if the department determines a claim is valid, the Director must provide only non-monetary relief unless and until funds are appropriated by the legislature to pay claims.

Findings of Fact

Based on the current record and depending on how Lane County interprets the provisions of its 1977 "Unzoned Area Development Permit" code, current land use regulations may restrict the use of the subject property relative to the uses allowed when the claimants acquired the property in 1977.

As explained in Section V.(2) of this report, if the claimants cannot divide the subject property into more parcels under the current two-acre minimum lot size for residential development than they could have when they acquired the property in 1977 (based on "water supply and sewage facility requirements" and Goal 14), laws enforced by the Commission or the department restrict the division of the 14.29-acre property into one-acre lots for residential use. The claim asserts that laws enforced by the Commission or department reduce the fair market value of the property by \$21,127,000. Because the claim does not provide an appraisal or other specific documentation for how the specified restrictions reduce the fair market value of 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 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 James and Carol Silke to use the 14.29 acres of for a use permitted at the time they acquired the property on November 4, 1977.

Conclusion

Based on the record before the department and depending on how Lane County interprets the provisions of its 1977 "Unzoned Area Development Permit," the 14.29-acres may have been able

to be divided into parcels less than two acres when the claimants acquired it in 1977 as explained in Section V. (2) of this report, the claimants have established that they are entitled to relief under ORS 197.352(1) as a result of land use regulations enforced by the Commission or the department.

1. In lieu of just compensation, the State of Oregon will not apply the requirements of the following law enforced by the Commission or the department to the James and Carol Silkes' division of the 14.29-acre property into parcels less than two acres for residential use: the applicable provisions of OAR 660-004-0040. This rule will not apply to the Silkes' division of the subject property for residential use only to the extent necessary to allow them to use the property as described in this report, and only to the extent that the use was permitted when they acquired the property on November 4, 1977.
2. The action by the State of Oregon provides the state's authorization to James and Carol Silke to use the property subject to the standards in effect on November 4, 1977. On that date, the property was subject to applicable provisions of Statewide Planning Goal 14, which required a minimum parcel size of at least one acre.
3. To the extent that any law, order, deed, agreement or other legally enforceable public or private requirement provides that the 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 ORS 227.160, other permits or authorizations from local, state or federal agencies, and restrictions on the use of the property imposed by private parties.
4. Any use of the 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 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 property by the claimants.

VII. COMMENTS ON THE DRAFT STAFF REPORT

The department issued its draft staff report on this claim on September 16, 2005. 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.