

BEFORE THE DEPARTMENT OF ADMINISTRATIVE SERVICES,
THE DEPARTMENT OF LAND CONSERVATION AND DEVELOPMENT,
THE BOARD AND DEPARTMENT OF FORESTRY,
DEPARTMENT OF WATER RESOURCES, AND
THE DEPARTMENT OF ENVIRONMENTAL QUALITY
OF THE STATE OF OREGON,

IN THE MATTER OF THE CLAIM FOR) FINAL ORDER
COMPENSATION UNDER ORS 197.352) CLAIM NO. M118586
(BALLOT MEASURE 37) OF)
Fred W. Netter, Trustee of the Fred W. Netter Trust;)
Teresa H. Netter, Trustee of the Teresa H. Netter Trust; and)
Nellie L. Netter, CLAIMANTS)

Claimants: Fred W. Netter, Trustee of the Fred W. Netter Trust; Teresa H. Netter, Trustee of the Teresa H. Netter Trust; and Nellie L. Netter (the Claimants)

Property: Township 4S, Range 1W, Section 13, Tax lot 800
Township 4S, Range 1W, Section 13C, Tax lot 1700
Marion County Tax (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), the Oregon Water Resources Department (the WRD Report), the Oregon Department of Forestry (the ODF Report), and the Department of Environmental Quality (the DEQ Report), attached to and by this reference incorporated into this order.

ORDER

The Claim is denied as to laws administered by the Oregon Department of Forestry or the Oregon Board of Forestry, for the reasons set forth in the ODF Report.

The Claim is denied as to the laws administered by the Department of Water Resources, for the reasons set forth in the WRD Report.

The Claim is denied as to the laws administered by the Department of Environmental Quality for the reasons set forth in the DEQ Report.

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 Fred Netter's partition of the 97.83-acre property (tax lots 800 and 1700) or to his establishment of a dwelling on each parcel: applicable provisions of Goal 3 and ORS 215 enacted or adopted after December 29, 1977. These land use regulations will not apply to the claimant only to the extent necessary to allow him to partition the property and establish a dwelling on each parcel, and only to the extent that use was permitted when he acquired the property on December 29, 1977. The department acknowledges that the relief to which claimant Fred Netter is entitled under ORS 197.352 will not allow him to use the property in the manner set forth in the claim.

In lieu of compensation under ORS 197.352, the State of Oregon will not apply the following laws to Teresa Netter's partition of the 97.83-acre property (tax lots 800 and 1700) or to her establishment of a dwelling on each parcel: applicable provisions of Goal 3, ORS 215 and OAR 660, division 33, enacted or adopted after August 26, 1999. These land use regulations will not apply to the claimant only to the extent necessary to allow her to partition the property and establish a dwelling on each parcel, and only to the extent that use was permitted when she acquired the property on August 26, 1999. The department acknowledges that the relief to which claimant Teresa Netter is entitled under ORS 197.352 will not allow her to use the property in the manner set forth in the claim.

2. The action by the State of Oregon provides the state's authorization to claimant Fred Netter to use the property for the use described in this report, subject to the standards in effect on December 29, 1977. On that date, the property was subject to applicable provisions of Goal 3 and ORS 215 then in effect.

The action by the State of Oregon provides the state's authorization to claimant Teresa Netter to use the property for the use described in this report, subject to the standards in effect on August 26, 1999. On that date, the property was subject to applicable provisions of Goal 3, ORS 215 and OAR 660 division 33, 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 Condition 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).

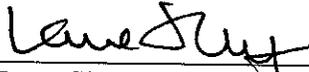
5. Without limiting the generality of the foregoing terms and conditions, in order for the claimants to use the subject property, it may be necessary for them to obtain a decision under ORS 197.352 from a city and/or county and/or metropolitan service district that enforces land use regulations applicable 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, by the Director of the WRD as a final order under ORS 197.352, OAR 125, division 145, and by the Department of Environmental Quality as a final order under ORS 197.352, OAR 125, division 145.

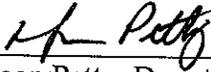
This Order is entered by the Oregon Board and Department of Forestry as a final order of the Board under ORS 197.352, OAR 629-001-0057, and OAR Chapter 125, division 145.

FOR DLCD AND THE LAND
CONSERVATION AND DEVELOPMENT
COMMISSION:



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

FOR THE DEPARTMENT OF
ADMINISTRATIVE SERVICES:



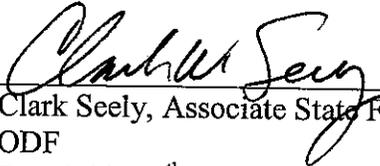
Dugan Petty, Deputy Administrator
DAS, State Services Division
Dated this 25th day of March, 2006.

FOR THE OREGON WATER RESOURCES
DEPARTMENT



Phillip C. Ward, Director
Water Resources Department
Dated this 25th day of April, 2006

FOR THE OREGON BOARD OF
FORESTRY AND THE OREGON
DEPARTMENT OF FORESTRY:



Clark Seely, Associate State Forester
ODF
Dated this 25th day of April, 2006.

FOR THE FOR DEPARTMENT OF
ENVIRONMENTAL QUALITY



Deputy Director
DEQ
Dated this 25th day of April, 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 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

April 25, 2006

STATE CLAIM NUMBER: M118586

NAMES OF CLAIMANTS: Fred W. Netter, Trustee of the
Fred W. Netter Trust;
Teresa H. Netter, Trustee of the
Teresa H. Netter Trust; and
Nellie L. Netter

MAILING ADDRESS: 15082 Ottaway Road
Aurora, Oregon 97002

PROPERTY IDENTIFICATION: Township 4S, Range 1W, Section 13
Tax lot 800
Township 4S, Range 1W, Section 13C
Tax lot 1700
Marion County

OTHER CONTACT INFORMATION: Mark P. O'Donnell, Esq.
Kristian Roggendorf, Esq.
O'Donnell & Clark, LLP
1706 Northwest Glisan Street, Suite 6
Portland, Oregon 97209

DATE RECEIVED BY DAS: June 10, 2005

180-DAY DEADLINE: April 25, 2006¹

I. SUMMARY OF CLAIM

Claimants Fred and Teresa Netter, individually and as trustees of the their respective trusts, and claimant Nellie Netter, seek compensation in the amount of \$1,609,000 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 97.83-acre property into a 60-lot subdivision and to develop a dwelling on each parcel. The subject property is located at 15082 Ottaway Road, near Aurora, in Marion County. (See claim.)

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).

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 partially valid and partially invalid.

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 Fred and Teresa Netter's partition of the 97.83-acre property into parcels and to their development of a dwelling on each parcel: applicable provisions of Statewide Planning Goal 3 (Agricultural Lands), ORS 215 and Oregon Administrative Rules (OAR) 660, division 33, enacted or adopted after December 29, 1977 (as to Fred Netter) and enacted or adopted after August 26, 1999 (as to Teresa Netter). These laws will not apply to claimant Fred Netter, only to the extent necessary to allow him a use of the property permitted at the time he acquired it on December 29, 1977. These laws will not apply to claimant Teresa Netter, only to the extent necessary to allow her a use of the property permitted at the time she acquired it on August 26, 1999. The department acknowledges that the relief to which claimants Fred and Teresa Netter are entitled under ORS 197.352 will not allow them to use the subject property in the manner set forth in the claim. (See the complete recommendation in Section VI of this report.)

The department recommends that the claim of Nellie Netter be denied as she no longer has an ownership interest in the property.

III. COMMENTS ON THE CLAIM

Comments Received

On July 12, 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, four written comments were received in response to the 10-day notice.

One comment is relevant to whether the restriction of the claimants' use of the property reduces the fair market value of the property. This comment has been considered by the department in preparing this report.

The remaining comments do 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 generally are 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 letters 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 criterion 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 criterion, whichever is later.

Findings of Fact

This claim was submitted to DAS on June 10, 2005, for processing under OAR 125, division 145. The claim identifies many state statutes and rules as "land use regulations" that restrict the use of the property and as the basis for the claim, including certain statutes in ORS 92, 197, 215 and 227 and OAR 660. 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 claim is not clear about the property that is the subject of the claim. It lists assessor's tax account numbers R10601, R10604 and R10611. Account R10601 is tax lot 800 and R10604 is tax lot 1700. Account R10611 is a narrow flag lot located along the western boundary of tax lot 800 on Ottaway Road and its junction with tax lot 1700. The claimants' representative included a title report for tax lots 800 and 1700, along with several other tax lots, but the other tax lots are not included in the description of the property in the claim. As a result, this report addresses only tax lots 800 (80.13 acres) and 1700 (17.70 acres).

Claimant Nellie Netter, along with her husband Ben Netter, acquired an interest in a portion of the subject property on September 27, 1943, as reflected by an owner's title insurance policy included with the claim. The title policy is for tax lot 800 only. No evidence is provided regarding when Nellie and Ben Netter acquired tax lot 1700. The department presumes that they acquired an interest in tax lot 1700 at some date prior to December 29, 1977, when they conveyed it and tax lot 800 to claimant Fred Netter and his then wife Audrey Netter by a real estate contract. The claimants' representative asserts that Fred Netter "entered into a binding agreement with his parents for the purchase and sale of the farm" in 1971. There is no evidence in the claim of a prior written agreement.

Section 5 of the December 29, 1977, contract is a provision providing for Ben and Nellie's use of their residence on the property until their death. Claimant Nellie Netter, the surviving spouse of Ben Netter, delivered a warranty deed for the subject property to claimant Fred Netter on March 4, 1998. The warranty deed contains no provision retaining a life estate for Nellie Netter. Nellie Netter is no longer listed as an owner on current Marion County deed records.

On August 26, 1999, Fred Netter conveyed, by warranty deed, an undivided one-half interest in the property to the Fred W. Netter Revocable Trust U/T/A and an undivided one-half interest to his wife Teresa Netter, trustee of the Teresa H. Netter Revocable Trust.

The Marion County Assessor's Office confirms that Fred Netter, trustee of the Fred W. Netter Trust, and Teresa Netter, trustee of the Teresa H. Netter Trust, are the current owners of the subject property.

Conclusions

Claimants Fred and Teresa Netter are "owners" of the subject property as that term is defined by ORS 197.352(11)(C). Fred Netter is an owner of the property as of December 29, 1977. Teresa Netter is an owner of the property as of August 26, 1999. Nellie Netter, is a "family member" of Fred Netter, as defined by ORS 197.352(11)(A), and acquired tax lot 800 on September 27, 1943. Nellie Netter acquired tax lot 1700 at some date prior to December 29, 1977.

Claimant Nellie Netter conveyed her life estate to her son Fred Netter on March 4, 1998. Based on the record, Nellie Netter is no longer an owner or a valid claimant for the purposes of this Measure 37 claim. She will continue to be referred to in this report as a "family member."

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.

Findings of Fact

The claimants' desire compensation or the right to subdivide the 97.83-acre property into 60 lots and to develop a dwelling on each lot. The claim lists a large number of state statutes and rules

under the headings “Department of Justice” and “Department of Land Conservation & Development,” including specific state statutes and rules codified in ORS 92, 197, 215 and 227 and OAR 660. According to the claim, ORS 92 is “. . . enforced in conformity with statewide planning goals, and thereby limit[s] development of rural parcels.” Similarly, the claim states that selected provisions in ORS 197, 215 and 227 (and certain Commission rules) “. . . require counties to comply with statewide planning goals, and thereby limit development on rural parcels.” There is no description, evidence or argument in the claim demonstrating how or why the listed statutes or rules restrict the claimants’ desired use of the property other than these statements and the extensive lists of specific laws. In the absence of any more specific description, evidence or argument concerning how or why specific statutes in ORS 92, 197 and 227 are “land use regulations” that restrict claimants’ desired use of the property, the department is unable to determine whether or how these laws may apply to the claimants’ desired use and as a result, must deny the claim as to these laws.²

The claim identifies additional state statutes and regulations that are under the jurisdiction of the Department of Forestry, Department of Environmental Quality and the Water Resources Department as a basis for the claim. These statutes and regulations are not administered or enforced by the department or Commission and are not addressed in this claim report.

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 claimants’ 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 3.³ 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 215.263, 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 and establish standards for the development of dwellings on existing or proposed parcels on that land. Further, ORS 215.263 (1973 edition) only authorized the partitioning of land subject to EFU zoning, and required that all divisions of land subject to EFU zoning comply with the legislative intent set forth in ORS 215.243 (Agricultural Land Use Policy).

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.

² At the time claimants Fred and Teresa Netter acquired their interests in the property, many of these laws were in effect. As a general matter, the statutes in ORS 197 and 227 do not restrict the use of real property. The claimants also list ORS 197.805 to 197.860 and OAR 661-001-0000 and 0005 and 661-010-0000 to 0075 (all pertaining to the Oregon Land Use Board of Appeals), but provide no description, evidence or argument of why or how these laws restrict the use of the property the claimants seek to carry out.

³ The claimants’ property is “agricultural land” because it contains Natural Resources Conservation Service Class I-IV soils.

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.)

Claimants Fred and Teresa Netter's family acquired tax lot 800 on September 27, 1943, prior to the adoption of the statewide planning goals and their implementing statutes and regulations. No county zoning applied to the property in 1943.

Claimants, Fred and Teresa Netter's family, acquired tax lot 1700 at some date prior to December 29, 1977. Claimant Fred Netter acquired tax lots 800 and 1700 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 claimant Fred Netter acquired his interests in the subject property, the statewide planning goals applied directly to his use of the property when he acquired it.⁴ Claimant Teresa Netter acquired tax lots 800 and 1700 on August 26, 1999. At that time, the property was subject to Marion County's EFU zone, which was acknowledged by the Commission. When Teresa Netter acquired the subject property, the desired division and development of the property would have been governed by the county's EFU zone and the applicable provisions of ORS 215 and OAR 660 then in effect.

Conclusions

The current zoning requirements, minimum lot size and dwelling standards established by Goal 3, ORS 215 and OAR 660, division 33, were all enacted or adopted after claimant Nellie Netter (family member to Fred and Teresa Netter) acquired tax lot 800 in 1943 and do not allow the claimants' desired division or development of that tax lot. There is insufficient evidence in the record to determine when Nellie Netter acquired tax lot 1700, but it was on or at some date prior to December 29, 1977, when she entered into a land sale contract to sell property, including tax lot 1700, to Fred Netter. Some provisions of Goal 3, ORS 215 and OAR 660, division 33, were enacted or adopted after December 29, 1977. These laws restrict the use of the subject property relative to the uses allowed when Nellie Netter acquired the two tax lots.

⁴ 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 acknowledgement of each county's comprehensive plan and implementing regulations. *Perkins v. City of Rajneeshpurham*, 300 Or 1 (1985); *Alexanderson v. Polk County*, 289 Or 427, rev. den 290 Or 137 (1980); *Sunnyside Neighborhood Ass'n. 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).

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 uses 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 \$1,609,000 as the reduction in the subject property's fair market value due to current regulations. This amount is based on the claimants' estimate of the market value of the subject property with 30 residential lots with individual septic systems, or 55 to 58 lots with a community sewage treatment system. No appraisal has been provided.

Conclusions

As explained in Section V.1 of this report, the current owners are Fred and Teresa Netter whose family member Nellie Netter acquired tax lot 800 on September 27, 1943, and tax lot 1700 at some date prior to December 29, 1977. 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 division and development of the property. The claimants estimate the reduction in value due to the restrictions to be \$1,609,000.

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 the statute.

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. All of these regulations were enacted or adopted after family member Nellie Netter acquired tax lot 800 on September 27, 1943. Some of these land use regulations were enacted or adopted after family member Nellie Netter acquired tax lot 1700.

Claimants have not sought a waiver to the requirements of Goal 7 (Natural Hazards).

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 and development of tax lot 800 were in effect when family member Nellie Netter acquired it in 1943. As a result, these laws are not exempt under ORS 197.352(3)(E). Those laws that were in effect when family member Nellie Netter acquired tax lot 1700 will continue to apply to the claimants' use of that property under ORS 197.352(3)(E).

Other laws in effect when the Nellie Netter acquired the subject property are also exempt under ORS 197.352(3)(E), and will continue to apply to the claimants' use of both tax lots. 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 the department is able to determine 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 the claimants' ability to divide the 97.83-acre property into parcels and to develop a dwelling on each parcel. The claim asserts that the laws enforced by the Commission or the department reduce the fair market value of the subject property by \$1,609,000. 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 land use regulations to allow Fred Netter to use the subject property for a use permitted at the time he acquired the property on December 29, 1977, and to allow Teresa Netter to use the subject property for a use permitted at the time she acquired the property on August 26, 1999. At the time Fred Netter acquired the property on December 29, 1977, it was zoned EFU by Marion County and subject to the land division and dwelling standards in applicable provisions of Goal 3 and ORS 215 then in effect. At the time Teresa Netter acquired the property on August 26, 1999, it was zoned EFU by Marion County and subject to the land division and dwelling standards in applicable provisions of Goal 3, ORS 215 and OAR 660, division 33.

Based on the record, the department finds that the claim of Nellie Netter is not valid because the claimant has not demonstrated her current ownership of the subject property. Nellie Netter is not a current owner of the property, and her claim is denied.

Conclusions

Based on the record before the department, claimant Nellie Netter has not established that she is entitled to relief under ORS 197.352(1), as a result of land use regulations enforced by the Commission or the department. Therefore, her claim is denied.

Based on the record, the department recommends that the claim for Fred and Teresa Netter be 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 Fred Netter's partition of the 97.83-acre property (tax lots 800 and 1700) or to his establishment of a dwelling on each parcel: applicable provisions of Goal 3 and ORS 215 enacted or adopted after December 29, 1977. These land use regulations will not apply to the claimant only to the extent necessary to allow him to partition the property and establish a dwelling on each parcel, and only to the extent that use was permitted when he acquired the property on December 29, 1977. The department acknowledges that the relief to which claimant

Fred Netter is entitled under ORS 197.352 will not allow him to use the property in the manner set forth in the claim.

In lieu of compensation under ORS 197.352, the State of Oregon will not apply the following laws to Teresa Netter's partition of the 97.83-acre property (tax lots 800 and 1700) or to her establishment of a dwelling on each parcel: applicable provisions of Goal 3, ORS 215 and OAR 660, division 33, enacted or adopted after August 26, 1999. These land use regulations will not apply to the claimant only to the extent necessary to allow her to partition the property and establish a dwelling on each parcel, and only to the extent that use was permitted when she acquired the property on August 26, 1999. The department acknowledges that the relief to which claimant Teresa Netter is entitled under ORS 197.352 will not allow her to use the property in the manner set forth in the claim.

2. The action by the State of Oregon provides the state's authorization to claimant Fred Netter to use the property for the use described in this report, subject to the standards in effect on December 29, 1977. On that date, the property was subject to applicable provisions of Goal 3 and ORS 215 then in effect.

The action by the State of Oregon provides the state's authorization to claimant Teresa Netter to use the property for the use described in this report, subject to the standards in effect on August 26, 1999. On that date, the property was subject to applicable provisions of Goal 3, ORS 215 and OAR 660 division 33, 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 Condition 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 April 4, 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.

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

**OREGON DEPARTMENT OF FORESTRY
Final Staff Report and Recommendation**

April 25, 2006

STATE CLAIM NUMBER: M118586

NAMES OF CLAIMANTS: Fred W. Netter, Trustee of the Fred W. Netter Trust; Teresa H. Netter, Trustee Teresa H. Netter Trust; and Nellie L. Netter

MAILING ADDRESS: 15082 Ottaway Road
Aurora, OR 97002

PROPERTY IDENTIFICATION: Township 4S, Range 1W, Section 13
Tax lots 800 and 1700
Marion County

OTHER CONTACT INFORMATION: Mark P. O'Donnell, Esq.
Kristian Roggendorf, Esq.
O'Donnell & Clark, LLP
1706 NW Glisan Street, Suite 6
Portland OR 97209

DATE RECEIVED BY DAS: June 10, 2005

180-DAY DEADLINE: April 25, 2006¹

I. SUMMARY OF CLAIM

See Department of Land Conservation and Development (DLCD) Staff Report.

II. SUMMARY OF STAFF RECOMMENDATION

Based on the findings and conclusions set forth below, the Department of Forestry (ODF) has determined the claim is not valid as to land use regulations administered by ODF or the Oregon Board of Forestry (Board) because none of the laws identified in the claim and administered by the Board or ODF restrict the claimants' right to partition the property and develop it for uses other than forest operations. ORS 527.730 provides that "[n]othing in the Oregon Forest Practices Act shall prevent the conversion of forestland to any other use." The claim submitted

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).

by the claimants proposes a conversion to uses other than forest uses. To the extent that the claimants may propose a forest operation in conjunction with the conversion, claimants have not submitted a written notification as required by law. Without a notification, ODF is unable to determine whether the laws listed in the claim apply to the claimants' use of the property or restrict their use of the property. As a result, ODF has not enforced an existing state land use regulation with respect to the claimant's use of the property. (See the complete recommendation in Section VI. of this report.)

III. COMMENTS ON THE CLAIM

Comments Received

See DLCD Final Staff Report.

IV. TIMELINESS OF CLAIM

Requirement

See DLCD Final Staff Report for requirements.

Findings of Fact

This claim was submitted to DAS on June 10, 2005, for processing under OAR 125, division 145. The claim identifies several state laws including ORS 526 and 527, and OAR 629 as the basis for the claim. Only laws that were enacted or adopted prior to December 2, 2004, the effective date of ORS 197.352, 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), as extended by the 139 days enforcement of the Measure was suspended during the pendency of the *MacPherson v. DAS* appeal based on land use regulations enacted or adopted prior to December 2, 2004, and is therefore timely filed.

V. ANALYSIS OF CLAIM

1. Ownership

ODF adopts the findings of fact and conclusions of law regarding ownership contained in the DLCD Final Staff Report for this claim.

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 claimants' desire compensation or the right to divide the 97.83-acre property into parcels and to develop a dwelling on each parcel. The claim lists the following state statutes and rules administered by ODF or the Board as laws that restrict the use of the property as the basis for the claim: ORS 526.016; 526.031, 526.166, 526.168, 526.194, 526.305 to 370, 526.425, 526.490, 526.500 to 515, 526.900, 526.905, 527.610 to 770, 527.990 and 527.992. The claim also lists the following rules of the Board: OAR 629-001-0000 to 0055, 629-020-0000 to 0070, 629-045-0005 to 0010, 629-605-0100 to 0500, 629-610-0000 to 0090, and 629-625-0000 to 0700. The only discussion in the claim as to how or why these laws restrict the use of the property that the claimants seek to carry out is the following statement: "State forestry statutes limit the development and division of land zoned for forestry." The property (tax lots 800 and 1700) is not zoned for forestry, and the laws listed in the claim only apply to forest operations (which is not the use the claimants have described in their claim).

One of the cited laws, ORS 527.730, Conversion of forestland to other uses, states, "Nothing in the Oregon Forest Practices Act shall prevent the conversion of forestland to any other use." No laws enforced by the Board or ODF restrict the division of the property or the establishment of dwellings.

The subject property does appear to include trees. Certain uses of property are forest "operations" that are regulated under the Forest Practices Act. If trees are harvested for commercial use, some laws listed in the claim will apply to the operation.

A notification of intent to conduct a forest operation is required in order for ODF to determine whether laws it or the Board may enforce apply to the claimants' intended use of the subject property in a way that restricts the use of the subject property, and reduces its fair market value. No notification has been made.

The claim lists additional state statutes and regulations that are administered by the Departments of Land Conservation and Development, Environmental Quality, and Water Resources. These statutes and regulations are not administered or enforced by the Board and ODF and are not addressed in this report.

Conclusions

Nothing in the laws that are listed in the claim and enforced or administered by ODF or the Board applies to or restricts the partition of the property or residential development of this property by the claimants.

Persons proposing to conduct a forest operation are required to submit a notification of the operation to ODF. Nothing in ORS 197.352 relieves an operator or landowner from this obligation, and until a notification is submitted, ODF is unable to determine whether laws it or the Board administers apply to the claimants' use of the property.

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 claimants have not demonstrated that any land use regulations administered by ODF or the Board restrict their use of the subject property or reduce its fair market value.

Conclusions

The claimants have not demonstrated that laws enforced or administered by ODF or the Board restrict their use of this property and thus, have not demonstrated that those laws reduce the fair market value of the subject property.

4. Exemptions Under ORS 197.352(3)

ORS 197.352 does not apply to certain land use regulations. These exemptions are set forth in ORS 197.352(3).

Findings of Fact

ORS 197.352(3) exempts laws enacted before a claimant acquired their interest in the property. Claimant Fred Netter acquired an interest in the property on December 29, 1977. Most forest practice laws were first enacted in 1971 and 1972, although some date back to 1941. Claimant Teresa Netter acquired an interest in the property in 1999. At that time, virtually all current forest practice laws were in effect. ODF is unable to determine whether 197.352(3)(E) or other exemptions in 197.352(3) may apply because the claimants have not proposed a use that is subject to these laws.

Some FPA regulations were enacted to control water pollution resulting from forest operations. ORS 197.352(B) specifically exempts regulations “restricting or prohibiting activities for the protection of public health and safety..., including pollution control.” Such regulations may apply to the property, depending upon the activities the claimants may wish to undertake.

Other FPA regulations cited by the claimants may be exempted under ORS 197.352(3).

Conclusions

ODF concludes that many of the listed land use regulations are likely exempt under ORS 197.352(3). Until there is a notification of an operation, however, a final determination of the applicability of the listed laws to a particular forest operation on the property cannot be made.

Laws in effect when claimants Fred and Teresa Netter acquired 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 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 claimants submit a notification of intent to conduct a commercial forest operation. When the claimants submit a notification, 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 (3)(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 uses 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

Based on the current record, the claimants (including Nellie Netter) are not entitled to relief under ORS 197.352 from ODF or the Board. ODF denies any relief for this claim because neither the Board nor the Department has enforced laws that restrict the division of the subject property into parcels or lots, and the use of the property for residential purposes.

VII. COMMENTS ON THE DRAFT STAFF REPORT

ODF issued its draft staff report on this claim on April 4, 2006. 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. Comments received have been taken into account by the department in the issuance of this final report.

**ORS 197.352 (2004 OREGON BALLOT MEASURE 37)
CLAIM FOR COMPENSATION**

OREGON WATER RESOURCES DEPARTMENT

Final Staff Report and Recommendation

April 25, 2006

STATE CLAIM NUMBER: M118586

NAME OF CLAIMANTS: Fred W. Netter & Teresa H. Netter,
Nellie L. Netter

MAILING ADDRESS: 15082 Ottaway Rd.
Aurora, OR 97002

PROPERTY IDENTIFICATION: T4S, R1W, section 13 WM, tax lots
800 and 1700

DATE RECEIVED BY DAS: June 10, 2005

180-DAY DEADLINE: April 25, 2006¹

I. CLAIM

The claimants, Fred W. Netter, Teresa H. Netter and Nellie L. Netter, seek compensation in the amount of \$1,609,000 for the reduction in fair market value in the Property as a result of numerous statutes and rules. The statutes and rules listed that are administered by the Oregon Water Resources Department (WRD) include ORS chapter 536 and OAR 690-005-001 through 690-005-0060. The property is located at 15082 Ottaway Rd., Aurora, OR in Marion County and is described as T4S, R1W, section 13 WM, tax lots 800 and 1700. (See claim and correspondence.)

II. SUMMARY OF STAFF RECOMMENDATION

Based on the findings and conclusions set forth below, WRD has determined that the claim is not valid, and finds the claimants are not entitled to relief under ORS 197.352. Based on advice of counsel and department staff recommendations, this claim lacks evidence that WRD has enforced an existing law since December 2, 2004 to restrict the claimants' use of their property.

¹ In *MacPherson v. Dep't of Admin. Servs.*, __ Or __, 2006 Ore. LEXIS 104 (February 21, 2006), the Marion County trial court entered an order suspending all timelines under ORS 197.352. This order was in effect for a period of 139 days, extending the 180-day deadline under ORS 197.352(6) by that same period.

Based on this determination, the department has not completed a full evaluation or determination on the merits or substance of the remainder of the elements necessary for it to approve a claim.

III. COMMENTS RECEIVED

Pursuant to OAR 125-145-0080, the Oregon Department of Administrative Services (DAS) provided written notice to the owners of surrounding properties as determined by DAS. According to DAS, four comments were received from the notice mailed, which WRD has considered in preparing this report.

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 ORS 197.352 (December 2, 2004), within two years of that effective date or the date the public entity applies for 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 ORS 197.352 (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

WRD incorporates by reference the findings of fact in the Draft Staff Report of the Department of Land Conservation and Development (DLCD) regarding the timeliness of this claim.

Conclusions

The claim was submitted within two years of December 2, 2004, based in part on state laws in effect prior to December 2, 2004, and based in part on state laws enacted after 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 to "owners" as that term is defined in ORS 197.352(11)(C). Under that section, an "owner" is "the present owner of the property, or any interest therein."

Findings of Fact

WRD incorporates by reference the findings of fact in the Draft Staff Report of the Department of Land Conservation and Development (DLCD) regarding the timeliness of this claim.

Conclusions

The claimants, Fred Netter and Teresa Netter, are “owners” of the subject property as that term is defined by ORS 197.352(11)(C). Fred Netter is an owner of the property as of December 29, 1977. Teresa Netter is an owner of the property as of August 26, 1999. Claimants Fred and Teresa Netter’s mother, Nellie Netter, is a “family member” as defined by ORS 197.352(11)(A), and acquired tax lot 800 on September 27, 1943. Nellie Netter acquired tax lot 1700 at some date prior to December 29, 1977.

Claimant Nellie Netter conveyed her interest in the property to her son, Fred Netter, on December 29, 1977. Based on the record, Nellie Netter is no longer an owner or a valid claimant for the purposes of this Measure 37 claim. She will continue to be referred to in this report as a “family member.”

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 lists ORS 536.032 to 536.090 and 537.505 to 537.791, and Oregon administrative rules 690-005-0010 to 690-005-0060, 690-009-0010 to 690-009-0050, and 690-010-0045 to 690-010-0070 under the heading “Oregon Water Resources Department.” The claim contains a statement that these laws “are tied to statewide planning and development goals and thereby limit development of rural parcels.” There is no evidence or argument presented concerning how or why these laws are “land use regulations” that restrict the use of the property the claimants wish to carry out.

According to information in WRD’s water right records, there is a water right appurtenant to at least a portion of the Property. The Claimants have not asserted that WRD has denied an application for a permit, or limited the use of water under an existing water right with respect to the claimants’ use of tax lots 800 and 1700. According to information in WRD’s water right information system, there is no record of an application by a Fred W. Netter, Teresa H. Netter or Nellie L. Netter for a permit to use water on the Property.

The Oregon Water Code was enacted in 1909. Under this authority (ORS 536) the Water Resources Commission is obligated to adopt rules and standards to allow the orderly development of waters of the State and to protect senior water right holders. The Commission is further instructed to progressively formulate an integrated, coordinated program for the use and control of all the water resources of this state. Ground water is specifically managed under the 1955 Ground Water Act (ORS 537.505). The claimants have no right to use water except as

provided under the terms of Oregon law. WRD has not taken any action to enforce any law that restricts any right claimants may have to use water on tax lots 800 and 1700.

Conclusions

The claimants have not applied for a water right for use of water on the Property. WRD has not taken any action since December 2, 2004, to enforce an existing state law that restricts the claimants' rights to use tax lots 800 and 1700 for any purpose. As a result, there is no basis upon which WRD may approve a claim under ORS 197.352.

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."

Findings of Fact

According to the claimants, unspecified land use regulations would cause a decrease in the value of their property by \$1,609,000. WRD requested that the claimants clarify several issues, including the amount by which the restriction in use imposed by each cited land use regulation has caused a reduction in the fair market value of the Property. The claimants did not provide clarification as to this issue.

Conclusions

The claim provides no evidence that the Water Resources Department has enforced a "land use regulation" in a manner that restricts claimants' use of their property or has reduced its fair market value. As a result, there is no evidence in the record for this claim that the fair market value of the property has been reduced by a law that WRD has enforced since December 2, 2004 (the effective date of ORS 197.352).

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. WRD has not analyzed whether any of the exemptions may apply to this claim, because it has determined that there is no restriction on use, and no reduction in value.

VI. FORM OF RELIEF

ORS 197.352(1) requires payment of compensation to an owner of private real property if the department has enacted or enforced a law that restricts the use of the property in a manner that reduces its fair market value. Because of the lack of evidence that an existing law has been enforced since December 2, 2004, in a manner that has restricted the claimants' use of the

property and has reduced the fair market value of the property, WRD did not make further evaluations or determination on the merits or substance of the claim.

Conclusions

No showing has been made that WRD has enforced an existing law since December 2, 2004 to restrict an existing right of the claimants. As a result, WRD recommends that this claim be denied as to laws administered by WRD.

**ORS 197.352 (BALLOT MEASURE 37 (2004))
CLAIM FOR COMPENSATION**

**OREGON DEPARTMENT OF ENVIRONMENTAL QUALITY
Final Staff Report and Recommendation
April 25, 2006**

OREGON CLAIM NUMBER: M 118586

NAME OF CLAIMANTS: Fred, Teresa & Nellie Netter

MAILING ADDRESS: 15082 Ottaway Road
Aurora, OR 97002

PROPERTY DESCRIPTION: 15082 Ottaway Road
Aurora, Oregon
Tax Lots 800 and 1700, T4S, R1W, section
13, W.M.
Marion County

**OTHER CONTACT INFORMATION
FOR CLAIMANT:** Mark P. O'Donnell
O'Donnell & Clark, LLP
1706 NW Glisan Street, Suite 6
Portland, OR 97209
(503) 222-9981

OTHER INTEREST IN PROPERTY:

DATE RECEIVED BY DAS: June 10, 2005

180-DAY DEADLINE: April 25, 2006¹

I. CLAIM

See Department of Land Conservation and Development (DLCD) staff report.

II. SUMMARY OF STAFF RECOMMENDATION

¹ In *MacPherson v. Dep't of Administrative Services*, __ Or __, 2006 Ore. LEXIS 104 (February 21, 2006), the Marion County trial court entered an order suspending all timelines under ORS 197.352. This order was in effect for a period of 139 days, extending the 180-day deadline under ORS 197.352(6) by that same period.

Based on the findings and conclusions set forth below, the Department of Environmental Quality (Department) has determined the claim is not valid because none of the laws identified in the claim as administered by the Department or the Environmental Quality Commission (Commission) have been enforced, and there is no evidence that the laws restrict claimant's ability to divide the property or establish a residence on each parcel. In addition, the claimants have not filed applications with the Department, or Clackamas County, which has been delegated authority by the Department to administer the on-site sewage disposal system within the County, to construct on-site sewage disposal systems on the property, and the Department has taken no action to enforce the on-site sewage disposal statutes or implementing rules with respect to the claimants or the property. (See the complete recommendation in Section VI. of this report.)

III. COMMENTS ON THE CLAIM

See DLCD staff report.

IV. TIMELINESS OF CLAIM

See DLCD staff report.

V. ANALYSIS OF CLAIM

1. Ownership

The findings of the Draft Staff Report of the Department of Land Conservation and Development on this claim regarding ownership are incorporated into this report by this reference.

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 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 claimants wish to subdivide the subject property into an unspecified number of residential lots. The claim lists a number of specific statutes and rules from ORS chapters 454 and OAR chapter 340, Division 071. Nothing in those statutes and rules restrict the division of land into residential lots as proposed by claimants.

The cited statutes and regulations require an application to the Department, or a local government that has been delegated authority by the Department to administer the on-site sewage disposal program, before construction of an on-site sewage disposal system. The

claimants have not filed an application to construct an on-site sewage disposal system or systems on the property. Under ORS 197.352(7), property owners are not required to file a land use application with a local government prior to seeking relief under the Measure, but there is no corresponding exemption from state permit requirements.

Under ORS 197.352(1), existing laws may be the basis for relief only if a public entity enforces existing laws. The Department has taken no action to enforce the on-site sewage disposal statutes or implementing rules with respect to the claimants or the property. Until the Department takes some specific action with respect to the property, there is no basis for relief under ORS 197.352.

Under ORS 197.352(11) "land use regulations" do not include administrative rules of the Oregon Environmental Quality Commission. As a result, no relief may be authorized with regard to the Commission's rules.

Conclusions

Nothing in the laws and rules cited by claimants restricts the division of the property into residential lots. The claim includes no evidence demonstrating how the listed statutes and rules restrict the use of the property. DEQ has not enforced a state land use regulation to restrict claimants' use of their property. Furthermore, Measure 37 does not exempt claimants or the Department from following the legal requirements to apply for an on-site sewage disposal permit prior to construction. Until the Department has acted on such a permit application, there is no basis for a claim for relief. Finally, the Commission rules listed in an exhibit to the claim are not state "land use regulations" under ORS 197.352(11).

3. Effect of Regulations on Fair Market Value

In order to establish a valid claim, Section 1 of Ballot Measure 37 requires the current land use regulation(s) described in Section V. (2). of this report to have "the effect of reducing the fair market value of the property, or any interest therein."

Findings of Fact

The claimants have not demonstrated that any land use regulations administered by the Department restrict their use of the subject property.

Conclusions

The claimants have not demonstrated that laws and regulations administered by the Department or Commission restrict their use of the property and thus, have not demonstrated that those laws and regulations reduce the fair market value of the subject property.

4. Exemptions under section 3 of Measure 37

Ballot Measure 37 (2004) does not apply to certain land use regulations. The type of land use regulations not subject to a claim for compensation under Ballot Measure 37 are set forth in section 3 of the measure. These include laws restricting or prohibiting activities for the protection of public health and safety such as sanitary regulations.

Findings of Fact

The statutes and rules listed in the claim likely are exempt as laws enacted to protect the public health and safety. Without some evidence from the claimants as to how and why the listed laws restrict the use of the property, however, the Department is unable to determine whether this or other exemptions under ORS 197.352 (3) apply. (See section V.2, above.)

VI. FORM OF RELIEF

Based on the current record, the claimants are not entitled to relief under ballot Measure 37. Department staff recommend this claim be denied because neither the Department nor the Commission has enforced laws that restrict the division of the subject property, or the use of the property for residential purposes.

VII. COMMENTS ON THE DRAFT STAFF REPORT

The department issued its draft staff report on this claim on March 13, 2006. Under OAR 125-145-0100(3), there was 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. No comments were received during the period provided.