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 COMPENSATION UNDER ORS 197.352 (BALLOT MEASURE 37) OF Al and Elsie Chachere, CLAIMANTS	))))	FINAL ORDER CLAIM NO. M118493

Claimants: Al and Elsie Chachere (the Claimants)

Property: Tax lot 11605, Township 37S, Range 4W, Section 36, Jackson County (the Property)

Claim: The demand for compensation and any supporting information received from the Claimants by the State of Oregon (the Claim).

Claimants submitted the Claim to the State of Oregon under ORS 197.352. Under OAR 125-145-0010 *et seq.*, the Department of Administrative Services (DAS) referred the Claim to the Department of Land Conservation and Development (DLCD) as the regulating entity. This order is based on the record herein, including the Findings and Conclusions set forth in the Final Staff Report and Recommendation of DLCD (the DLCD Report) attached to and by this reference incorporated into this order.

ORDER

The Claim is approved as to laws administered by DLCD and the Land Conservation and Development Commission (LCDC) for the reasons set forth in the DLCD Report, and subject to the following terms:

1. In lieu of compensation under ORS 197.352, the State of Oregon will not apply the following laws to the claimants' division of a portion of the 35.57-acre property into two 5-acre parcels or to their development of a dwelling on each parcel: the applicable provisions of Goal 3, ORS 215 and OAR 660, division 33, enacted or adopted after June 4, 1974. These land use regulations will not apply to the claimants only to the extent necessary to allow them to use the subject property for the use described in this report, and only to the extent that use was permitted when they acquired the property on June 4, 1974.

2. The action by the State of Oregon provides the state's authorization to the claimants to use the property for the use described in this report, subject to the standards in effect on June 4, 1974. On that date, the property was subject to the applicable provisions of ORS 215 then in effect, including the interim planning goals set forth in ORS 215.515 (1973 edition).

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 property by the claimants under the terms of the order will remain subject to the following laws: (a) those laws not specified in (1) above; (b) any laws enacted or enforced by a public entity other than the Commission or the department; and (c) those laws not subject to ORS 197.352 including, without limitation, those laws exempted under ORS 197.352(3).

5. Without limiting the generality of the foregoing terms and conditions, in order for the claimants to use the subject property, it may be necessary for them to obtain a decision under ORS 197.352, from a city and/or county and/or metropolitan service district that enforces land use regulations applicable to the property. Nothing in this order relieves the claimants from the necessity of obtaining a decision under ORS 197.352, from a local public entity that has jurisdiction to enforce a land use regulation applicable to a use of the subject property by the claimants.

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

FOR DLCD AND THE LAND CONSERVATION AND DEVELOPMENT COMMISSION:

Lane Shetterly, Director
DLCD
Dated this 31st day of March, 2006.

FOR the DEPARTMENT OF ADMINISTRATIVE SERVICES:

Dugan Petty, Deputy Administrator
DAS, State Services Division
Dated this 31st day of March, 2006.

NOTICE OF RIGHT TO APPEAL OR OTHER JUDICIAL RELIEF

You are entitled, or may be entitled, to judicial remedies including the following:

1. Judicial review under ORS 183.484: Judicial review under ORS 183.484 may be obtained by filing a petition for review within 60 days from the service of this order. A petition for judicial review under ORS 183.484 may be filed in the Circuit Court for Marion County or the Circuit Court in the county in which you reside.

2. A cause of action under ORS 197.352 (Measure 37 (2004)): If a land use regulation continues to apply to the subject property more than 180 days after the present owner of the property has made written demand for compensation under ORS 197.352[1], 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."

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[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.

BALLOT MEASURE 37 (ORS 197.352)
CLAIM FOR COMPENSATION

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

March 31, 2006

STATE CLAIM NUMBER:	M118493
NAMES OF CLAIMANTS:	Al and Elsie Chachere
MAILING ADDRESS:	4430 Humbug Creek Road Applegate, Oregon 97530
PROPERTY IDENTIFICATION:	Township 37S, Range 4W, Section 36 Tax lot 11605 Jackson County
DATE RECEIVED BY DAS:	May 23, 2005
180-DAY DEADLINE:	April 7, 2006[1]

I. SUMMARY OF CLAIM

The claimants, Al and Elsie Chachere, seek compensation for a reduction in the value of certain real property as a result of land use regulations that are alleged to restrict the use of the property. The claimants desire compensation or the right to divide a portion of their 37.57-acre property into three or four 5-acre parcels and to develop a dwelling on each parcel. The subject property is located at 4430 Humbug Creek Road, Applegate, in Jackson County. (See claim.)

II. SUMMARY OF STAFF RECOMMENDATION

Based on the findings and conclusions set forth below, the Department of Land Conservation and Development (the department) has determined that this claim is valid. Department staff recommends that, in lieu of compensation, the requirements of the following laws enforced by the Land Conservation and Development Commission (the Commission) or the department, not apply to the claimants' division of a portion the 37.57-acre property into two 5-acre parcels and to their development of a dwelling on each parcel: Statewide Planning Goal 3 (Agricultural Lands), ORS 215 and Oregon Administrative Rules (OAR) 660, division 33, enacted or adopted after June 4, 1974. These laws will not apply to the claimants only to the extent necessary to allow them to use the subject property for the use described in this report, and only to the extent

[1] This date reflects 180 days from the date the claim was submitted as extended by the 139 days enforcement of Ballot 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).ORS 197.352

that use was permitted when they acquired the property on June 4, 1974. (See the complete recommendation in Section VI. of this report.)

III. COMMENTS RECEIVED

On June 20, 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, no written comments were received in response to the 10-day notice.

IV. TIMELINESS OF CLAIM

Requirement

ORS 197.352(5) (Ballot Measure 37, Section 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 Ballot Measure 37 (December 2, 2004), within two years of that effective date or the date the public entity applies the land use regulation as an approval criteria to an application submitted by the owner, whichever is later; or

2. For claims arising from land use regulations enacted after the effective date of Ballot Measure 37 (December 2, 2004), within two years of the enactment of the land use regulation, or the date the owner of the property submits a land use application in which the land use regulation is an approval criteria, whichever is later.

Findings of Fact

This claim was submitted to DAS on May 23, 2005, for processing under OAR 125, division 145. The claim identifies Jackson County's "1983 rezoning to EFU" as the basis for the claim. Only laws that were enacted or adopted prior to December 2, 2004, are the basis for this claim.

Conclusions

The claim has been submitted within two years of December 2, 2004, the effective date of Ballot Measure 37, based on land use regulation 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

Al and Elsie Chachere acquired an undivided one-half interest in the subject property on June 4, 1974, through an assignment of contract from Ray and Mary Chachere, as reflected in an assignment of contract included with the claim. Ray and Mary Chachere acquired the subject property on January 22, 1974, also through an assignment of contract included with the claim. A current tax statement from Jackson County identifies the claimants as the current owners of the subject property.

Conclusions

The claimants, Al and Elsie Chachere, are "owners" of the subject property as that term is defined by ORS 197.352(11)(C) as of June 4, 1974. Ray and Mary Chachere are "family members" as that term is defined by ORS 197.352(11)(A) as of January 22, 1974.

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 claimant or a family member acquired the property.

Findings of Fact

The claim indicates that the claimants desire to divide a portion of their 37.57-acre property into two 5-acre parcels and to develop each parcel with a dwelling, which the property's EFU zoning precludes them from doing.

The claim is based generally on Jackson County's current 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.[2] Goal 3 became effective on January 25, 1975, and required that agricultural lands as defined by the Goal to be zoned Exclusive Farm Use (EFU) pursuant to ORS 215.

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[2] The claimants' property is "agricultural land" because it is predominantly composed of Natural Resources Conservation Service (NRCS) Class I-IV soils. One of the soils, Shefflein loam (#164B) is rated "prime" by the NRCS. (See www.websoilsurvey.usda.nrcs.gov.)

Current land use regulations, particularly ORS 215.263, 215.284, 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 development of dwellings on existing or proposed parcels on that land.

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.

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.)

The claimants and their family acquired the subject property on January 22, 1974, and June 4, 1974, after the adoption of Senate Bill 100 (Chapter 80, Oregon Laws 1973, effective on October 5, 1973) but before the adoption of the statewide planning goals, effective on January 25, 1975. At that time, it was zoned Open Space Development (OSD-5) by Jackson County. The OSD-5 zone required a five-acre minimum size for the creation of new lots or parcels, and single-family dwellings were allowed on all existing parcels.

During the period between October 5, 1973, and January 25, 1975, ORS 197.175(1) and 197.280 (1973 editions) required, in addition to any local plan or zoning provisions, that cities and counties exercise their planning responsibilities in accordance with the interim land use planning goals set forth in ORS 215.515 (1973 edition). *Petersen v. Klamath Falls*, 279 Or 249 (1977); *see also*, *Meeker v. Board of Comm'rs*, 287 Or 665 (1979) (review of a subdivision is an exercise of planning responsibilities requiring application of the goals); *State Housing Council v. Lake Oswego*, 48 Or App. 525 (1981) (noting that while "[l]and use planning responsibility is not defined in ORS ch 197, the Supreme Court has interpreted that term as including annexation approvals, *subdivision approvals* [emphasis added] and partition approvals.") citing *Petersen*, *Meeker* and *Alexanderson v. Polk County*, 285 Or 427 (1980). The claimants' desired use includes subdivision of their land. If the claimants had sought to create that use in 1974, as a matter of law, the use would have been subject to the interim planning goals at ORS 215.515.[3]

[3] The "interim" land use goals are set forth in ORS 215.515(1)(a) to (j) (1973 edition) as follows: (a) "To preserve the quality of the air, water and land resources of the state," (b) "To conserve open space and protect natural and scenic resources," (c) "To provide for the recreational needs of citizens of the state and visitors," (d) "To conserve prime farm lands for the production of crops," (e) "To provide for the orderly and efficient transition from rural to urban land use," (f) "To protect life and property in areas subject to floods, landslides and other natural disasters," (g) "To provide and encourage a safe, convenient and economic transportation system including all modes of transportation: Air, water, rail, highway and mass transit and recognizing differences in the social costs in the various modes of transportation," (h) "To develop a timely, orderly and efficient arrangement of public facilities and services to serve as a framework for urban and rural development," (i) "To diversify and improve the economy

The following interim goals are directly applicable to this claim: "To preserve the quality of the air, water and *land* [emphasis added] resources of the state"; "To conserve prime farm lands for the production of crops"; "To provide for the orderly and efficient transition from rural to urban land use"; "To protect life and property in areas subject to floods, landslides and other natural disasters"; "To provide and encourage a safe, convenient and economic transportation system including all modes of transportation: Air, water, rail, highway and mass transit and recognizing differences in the social costs in the various modes of transportation"; and "To develop a timely, orderly and efficient arrangement of public facilities and services to serve as a framework for urban and rural development." ORS 215.515 (1973 edition).

One of the interim goals directly applicable to this claim was to "conserve prime farm lands for the production of crops." Soil types are a determinant of prime farm land. Seven percent (approximately seven acres) of the soils on the 35.57-acre property are rated as "prime" by the Natural Resource Conservation Service (NRCS). No information has been provided to establish that the division of a portion of the subject property into two five-acre parcels, and the development of dwellings on those parcels complies with the interim planning goals in effect in 1974 when the claimants acquired the property. In particular, it is unclear whether division and development of the prime-farmland portion of the property would satisfy the interim goal requirement to "conserve prime farm lands for the production of crops."

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 since the claimants and their family acquired the subject property in 1974, and do not allow the desired division of the property into parcels less than 80 acres in size or allow the approval of dwellings. However, the claim does not establish whether or to what extent the claimants' desired use of the subject property complies with the interim planning goals in effect when they acquired the property in 1974, particularly with regard to the area of the property with prime soils.

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 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.

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of the state" and (j) "To ensure that the development of properties within the state is commensurate with the character and the physical limitations of the land." ORS 215.515 (1973 edition).

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

The claim "demand[s] compensation or waiver to go back to regulations that were in place when property was purchased." The claim does not specify a dollar amount that the fair market value of the subject property has been reduced as a result of land use laws enacted or adopted after the claimants and their family acquired it in 1974.[4]

Conclusions

As explained in Section V.(1) of this report, the claimants are Al and Elsie Chachere who acquired the subject property under ORS 197.352(11) on June 4, 1974, and whose family members acquired the property on January 22, 1974. Thus, under ORS 197.352, the claimants are due compensation for land use laws that restrict the use of the subject property in a manner that reduces its fair market value. The claim requests compensation for a reduction in the value of the subject property due to regulations that preclude them from dividing and developing their property. However, 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 the claimants acquired the property, it is not possible to substantiate a specific dollar amount the claimants demand for compensation. Nevertheless, based on the submitted information, the department determines that it is more likely than not that the fair market value of the subject property has been reduced to some extent as a result of land use regulations enforced by the Commission or the department.

4. Exemptions under ORS 197.352(3)

ORS 197.352 does not apply to certain land use regulations. In addition, under ORS 197.352(3) certain types of laws are exempt from ORS 197.352.

Findings of Fact

The claim is based on state land use regulations that restrict the use of the subject property, including applicable provisions of Goal 3, ORS 215 and OAR 660, division 33, which Jackson County has implemented through its current EFU zone. With the exception of applicable provisions of ORS 215, including the interim land use planning goals in effect in 1974, these state land use laws were not in effect when the claimants and their family acquired the subject property.

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[4] The tax statement from 1974-75 notes a real market value for the land (then 85.57 acres) of $25,250. The 2004-05 tax statement notes a real market value for the land (now 35.57 acres) of $75,810, a value of $120,770 for a two-story residence on the property and an additional $13,520 for a manufactured dwelling on the property.

Conclusions

Without a specific development proposal for the subject property, it is not possible for the department to determine all the laws that may apply to a particular use of the property, or whether those laws may fall under one or more of the exemptions under ORS 197.352. It appears that, with the exception of provisions of ORS 215 in effect in 1974, the general statutory, goal and rule restrictions on division and development of the claimants' property were not in effect when the claimants and their family acquired the property in 1974. As a result, these laws are not exempt under ORS 197.352(3)(E). Provisions of ORS 215, including the interim planning goals, in effect when the claimants and their family acquired the subject property in 1974 are exempt under ORS 197.352(3)(E) and will continue to apply to the property.

Other laws in effect when the claimants and their family acquired the subject property are also exempt under ORS 197.352(3)(E), and will continue to apply to the claimants' use of the property. There may be other laws that continue to apply to the claimants' use of the subject property that have not been identified in the claim. In some cases, it will not be possible to know which laws apply to a use of property until there is a specific proposal for that use. When the claimants seek a building or development permit to carry out a specific use, it may become evident that other state laws apply to that use. In some cases, some of these laws may be exempt under ORS 197.352(3)(A) to (D).

This report addresses only those state laws that are identified in the claim, or that the department is certain apply to the subject property based on the 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 their 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 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 permitted at the time the present owner acquired the property. The Commission, by rule, has directed that if the department determines a claim is valid, the Director of the department must provide only non-monetary relief unless and until funds are appropriated by the legislature to pay claims.

Findings of Fact

Based on the findings and conclusions in this report, laws enforced by the Commission or the department restrict the claimants' ability to divide a portion of the 37.57-acre property into two 5-acre parcels and to develop a dwelling on each parcel. The claim asserts that the laws enforced by the Commission or the department have reduced the fair market value of the subject property. Without an appraisal or other substantiating 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 a specific dollar amount the claimants demand for compensation. Nevertheless, the department acknowledges that state land use laws likely have reduced the fair market value of the non-prime portions of the property to some extent.

No funds have been appropriated at this time for the payment of claims. In lieu of payment of just compensation, ORS 197.352 authorizes the department to modify, remove or not apply all or parts of certain state land use regulations to allow the claimants to use the subject property for a use permitted at the time they acquired the property on June 4, 1974.

Conclusions

Based on the record, the department recommends that the claim 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 the claimants' division of a portion of the 35.57-acre property into two 5-acre parcels or to their development of a dwelling on each parcel: the applicable provisions of Goal 3, ORS 215 and OAR 660, division 33, enacted or adopted after June 4, 1974. These land use regulations will not apply to the claimants only to the extent necessary to allow them to use the subject property for the use described in this report, and only to the extent that use was permitted when they acquired the property on June 4, 1974.

2. The action by the State of Oregon provides the state's authorization to the claimants to use the property for the use described in this report, subject to the standards in effect on June 4, 1974. On that date, the property was subject to the applicable provisions of ORS 215 then in effect, including the interim planning goals set forth in ORS 215.515 (1973 edition).

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 property by the claimants under the terms of the order will remain subject to the following laws: (a) those laws not specified in (1) above; (b) any laws enacted or enforced by a public entity other than the Commission or the department; and (c) those laws not subject to ORS 197.352 including, without limitation, those laws exempted under ORS 197.352(3).

5. Without limiting the generality of the foregoing terms and conditions, in order for the claimants to use the subject property, it may be necessary for them to obtain a decision under ORS 197.352, from a city and/or county and/or metropolitan service district that enforces land use regulations applicable to the property. Nothing in this order relieves the claimants from the

necessity of obtaining a decision under ORS 197.352, from a local public entity that has jurisdiction to enforce a land use regulation applicable to a use of the subject property by the claimants.

VII. COMMENTS ON THE DRAFT STAFF REPORT

The department issued its draft staff report on this claim on March 13, 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.