

BEFORE THE DEPARTMENT OF ADMINISTRATIVE SERVICES AND
THE DEPARTMENT OF LAND CONSERVATION AND DEVELOPMENT OF
THE STATE OF OREGON

IN THE MATTER OF THE CLAIM FOR)	FINAL ORDER
COMPENSATION UNDER ORS 197.352)	CLAIM NO. M122330
(BALLOT MEASURE 37) OF)	
Larry Allen Neel and Mary Ann Neel, CLAIMANTS)	

Claimants: Larry Allen Neel and Mary Ann Neel (the Claimants)

Property: Township 35S, Range 2W Section 29, Tax lot 600, 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 the 18.59-acre property into three parcels or to their development of a dwelling on the two resulting vacant parcels: applicable provisions of Goal 4, ORS 215 and OAR 660, divisions 6, enacted or adopted after each of the claimants acquired the subject property. These laws will not apply to the claimants only to the extent necessary to allow Larry Allen Neel to use the subject property for the use described in this report, and only to the extent that use was permitted when he acquired the property on March 27, 1992, and to allow Mary Ann Neel to use the subject property for the use described in this report, and only to the extent that use was permitted when she acquired the property on February 2, 2001. The department acknowledges that the relief to which the claimants are entitled under ORS 197.352: 1) may not allow Larry Allen Neel to use the subject property to the extent of the claimants' desired use, as that use is described in this report, and 2) will not allow Mary Ann Neel to use the property for the claimants' desired use.

2. The action by the State of Oregon provides the state's authorization to claimant Larry Allen Neel to use the property for the use described in this report, subject to the standards in effect on March 27, 1992. On that date, the property was subject to compliance with Jackson County's acknowledged EFU zone, and the applicable provisions of Goal 3, ORS 215 and OAR 660, division 5, then in effect.

The action by the State of Oregon provides the state's authorization to claimant Mary Ann Neel to use the property for the use described in this report, subject to the standards in effect on February 2, 2001. On that date, the property was subject to compliance with Jackson County's acknowledged WR zone, and the applicable provisions of Goal 4, ORS 215 and OAR 660, division 6, currently in effect.

3. To the extent that any law, order, deed, agreement or other legally enforceable public or private requirement provides that the subject property may not be used without a permit, license or other form of authorization or consent, the order will not authorize the use of the property unless the claimants first obtain that permit, license or other form of authorization or consent. Such requirements may include, but are not limited to: a building permit, a land use decision, a "permit" as defined in ORS 215.402 or 227.160, other permits or authorizations from local, state or federal agencies and restrictions on the use of the subject property imposed by private parties.

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

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

This Order is entered by the Deputy 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 Director of the DAS as a final order of DAS under ORS 197.352, OAR 125, division 145, and ORS 293.

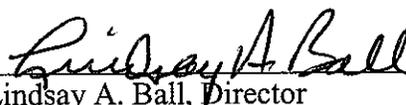
FOR DLCD AND THE LAND CONSERVATION
AND DEVELOPMENT COMMISSION:
Lane Shetterly, Director



Cora R. Parker, Deputy Director
DLCD

Dated this 24th day of July, 2006.

FOR the DEPARTMENT OF ADMINISTRATIVE
SERVICES:



Lindsay A. Ball, Director
DAS

Dated this 24th day of July, 2006.

NOTICE OF RIGHT TO APPEAL OR OTHER JUDICIAL RELIEF

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

1. Judicial review under ORS 183.484: Judicial review under ORS 183.484 may be obtained by filing a petition for review within 60 days from the service of this order. A petition for judicial review under ORS 183.484 may be filed in the Circuit Court for Marion County or the Circuit Court in the county in which you reside.
2. A cause of action under ORS 197.352 (Measure 37 (2004)): If a land use regulation continues to apply to the subject property more than 180 days after the present owner of the property has made written demand for compensation under ORS 197.352¹, the present owner of the property, or any interest therein, shall have a cause of action in the circuit court in which the real property is located.

(Copies of the documents that comprise the record are available for review at the Department's office at 635 Capitol Street NE, Suite 150, Salem, Oregon 97301-2540)

FOR INFORMATION ONLY

The Oregon Department of Justice has advised the Department of Land Conservation and Development that “[i]f the current owner of the real property conveys the property before the new use allowed by the public entity is established, then the entitlement to relief will be lost.”

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

ORS 197.352 (BALLOT MEASURE 37) CLAIM FOR COMPENSATION

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

July 24, 2006

STATE CLAIM NUMBER: M122330

NAMES OF CLAIMANTS: Larry Allen Neel and Mary Ann Neel

MAILING ADDRESS: 12315 Duggan Road
Central Point, Oregon 97502

PROPERTY IDENTIFICATION: Township 35S, Range 2W Section 29
Tax lot 600
Jackson County

DATE RECEIVED BY DAS: September 14, 2005

180-DAY DEADLINE: July 30, 2006¹

I. SUMMARY OF CLAIM

The claimants, Larry Allen Neel and Mary Ann Neel, seek compensation in the amount of \$544,000 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 18.59-acre property into three parcels and to develop a dwelling on the two resulting vacant parcels. The subject property is located at 12789 Duggan Road, near Central Point, 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 the claim is valid. 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 the claimants' division of the 18.59-acre property into three parcels or to their development of a dwelling on the two resulting vacant parcels: applicable provisions of Statewide Planning Goal 4 (Forest Lands), ORS 215 and Oregon Administrative Rules (OAR) 660, division 6, enacted or adopted after each of the claimants acquired the subject property. These laws will not apply to the claimants only to the extent necessary to allow Larry Allen Neel 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 that all timelines under Measure 37 were suspended during the pendency of *MacPherson v. Dept. of Admin. Svcs.*, 340 Or 117 (2006).

that use was permitted when he acquired the property on March 27, 1992, and to allow Mary Ann Neel to use the subject property for the use described in this report, and only to the extent that use was permitted when she acquired the property on February 2, 2001. The department acknowledges that the relief to which the claimants are entitled under ORS 197.352: 1) may not allow Larry Allen Neel to use the subject property to the extent of the claimants' desired use, as that use is described in this report, and 2) will not allow Mary Ann Neel to use the property for the claimants' desired use. (See the complete recommendation in Section VI. of this report.)

III. COMMENTS ON THE CLAIM

Comments Received

On May 19, 2006, pursuant to OAR 125-145-0080, the Oregon Department of Administrative Services (DAS) provided written notice to the owners of surrounding properties. According to DAS, no written comments were received in response to the 10-day notice

IV. TIMELINESS OF CLAIM

Requirement

ORS 197.352(5) requires that a written demand for compensation be made:

1. For claims arising from land use regulations enacted prior to the effective date of Measure 37 (December 2, 2004), within two years of that effective date, or the date the public entity applies the land use regulation as an approval criteria to an application submitted by the owner, whichever is later; or
2. For claims arising from land use regulations enacted after the effective date of Measure 37 (December 2, 2004), within two years of the enactment of the land use regulation, or the date the owner of the property submits a land use application in which the land use regulation is an approval criteria, whichever is later.

Findings of Fact

This claim was submitted to DAS on September 14, 2005, for processing under OAR 125, division 145. The claim identifies Jackson County's comprehensive plan and land development ordinance as the basis for the claim. Only laws that were enacted or adopted prior to December 2, 2004, are the basis for this claim.

Conclusions

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

V. ANALYSIS OF CLAIM

1. Ownership

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

Findings of Fact

Claimant Larry Allen Neel acquired the subject property from his mother, Betty J. Neel, on March 27, 1992, as reflected by a bargain and sale deed included with the claim. Larry Allen Neel conveyed an interest in the subject property to claimant Mary Ann Neel on February 2, 2001. Larry Allen Neel’s parents, Robert and Betty Neel, acquired the subject property on October 22, 1971, as reflected by a deed card and Jackson County’s report included with the claim. The Jackson County Assessor’s Office confirms the claimants’ current ownership of the subject property.

Conclusions

The claimants, Larry Allen Neel and Mary Ann Neel, are “owners” of the subject property as that term is defined by ORS 197.352(11)(C). Larry Allen Neel has been an owner since March 27, 1992, and Mary Ann Neel has been an owner since February 2, 2001. Larry Allen Neel’s parents, Robert and Betty Neel, are “family members” as defined by ORS 197.352(11)(A) and acquired the subject property on October 22, 1971.

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 claim indicates that the claimants desire to divide the subject property into three parcels and to develop a dwelling on the two resulting vacant parcels. It indicates that the desired use is not allowed under the property’s current zoning.

The claim is based generally on Jackson County’s current Woodlot Resource (WR) zone and the applicable provisions of state law that require such zoning. The claimants’ property is zoned WR as required by Goal 4, in accordance with ORS 215 and OAR 660, division 6, because the claimants’ property is “forest land” under Goal 4. Goal 4 became effective on January 25, 1975, and requires that forest land be zoned for forest use (see statutory and rule history under OAR 660-015-0000(4)). The forest land administrative rules (OAR 660, division 6) became effective on September 1, 1982, and ORS 215.705 to 215.755 and 215.780 became effective on November 4, 1993 (Chapter 792, Oregon Laws 1993). OAR 660-006-0026 and 660-006-0027 were amended on March 1, 1994, to implement those statutes.

The claimants' family acquired the subject property on October 22, 1971, prior to the adoption of the statewide planning goals and their implementing statutes and regulations.

Conclusions

The current zoning requirements, minimum lot size and dwelling standards established by applicable provisions of Goal 4, ORS 215 and OAR 660, division 6, were all enacted or adopted after the claimants' family acquired the subject property in 1971 and do not allow the desired division or residential development of the property. These laws restrict the use of the subject property relative to the uses allowed when the claimants' family acquired the property.

3. Effect of Regulations on Fair Market Value

In order to establish a valid claim, ORS 197.352(1) requires that the land use regulation(s) (described in Section V.(2) of this report) must have "the effect of reducing the fair market value of the property, or any interest therein."

Findings of Fact

The claim includes an estimate of \$544,000 as the reduction in the subject property's fair market value due to the regulations that restrict the claimants' desired use of the property. This amount is based on the claimants' assessment of the subject property's fair market value.

Conclusions

As explained in Section V.(1) of this report, the claimants are Larry Allen Neel and Mary Ann Neel whose family members acquired the subject property in 1971. Under ORS 197.352, the claimants are due compensation for land use regulations that restrict the use of the subject property and have the effect of reducing its fair market value. Based on the findings and conclusions in Section V.(2) of this report, laws enacted or adopted since the claimants' family acquired the subject property restrict the claimants' desired use of the property. The claimants estimate that the effect of the regulations on the fair market value of the subject property is a reduction of \$544,000.

Without an appraisal or other documentation, it is not possible to substantiate the specific dollar amount by which the land use regulations have reduced the fair market value of the subject property. Nevertheless, based on the evidence in the record for this claim, the department determines that the fair market value of the subject property has been reduced to some extent as a result of land use regulations enforced by the Commission or the department since the claimants' family acquired the property.

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, relative to the uses permitted when the claimants' family acquired the property, including applicable provisions of Goal 4, ORS 215 and OAR 660, division 6, which Jackson County has implemented through its current WR zone. All of these land use regulations were enacted or adopted after the claimants' family acquired the subject property.

Conclusions

It appears that none of the general statutory, goal and rule restrictions on residential division and development of the subject property were in effect when the claimants' family acquired the property on October 22, 1971. As a result, these laws are not exempt under ORS 197.352(3)(E). Laws in effect when the claimants' family acquired the subject property are exempt under ORS 197.352(3)(E) and do not provide a basis for compensation. In addition, other land use laws enacted or adopted for a purpose set forth in ORS 197.352(3)(A) to (D) are also exempt and would not provide a basis for compensation.

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 one or more laws that restrict the use of the subject property in a manner that reduces its fair market value. In lieu of compensation, the department may choose to not apply the law in order to allow the present owner to carry out a use of the subject property permitted at the time the present owner acquired the property. The Commission, by rule, has directed that if the department determines a claim is valid, the Director of the department must provide only non-monetary relief unless and until funds are appropriated by the legislature to pay claims.

Findings of Fact

Based on the findings and conclusions set forth in this report, laws enforced by the Commission or the department restrict the claimants' desired use of the subject property. The claim asserts that existing state land use regulations enforced by the Commission or the department have the effect of reducing the fair market value of the subject property by \$544,000. However, because the claim does not provide an appraisal or other relevant evidence demonstrating that the land use regulations described in Section V.(2) reduce the fair market value of the subject property, a specific amount of compensation cannot be determined. In order to determine a specific amount of compensation due for this claim, it would also be necessary to verify whether or the extent to which the claimants' desired use of the property was allowed under the standards in effect when they acquired the property. Nevertheless, based on the record for this claim, the department has determined that the laws on which the claim is based have reduced the fair market value of the subject property to some extent.

No funds have been appropriated at this time for the payment of claims. In lieu of payment of compensation, ORS 197.352 authorizes the department to modify, remove or not apply all or parts of certain land use regulations to allow Larry Allen Neel to use the subject property for a use permitted at the time he acquired the property on March 27, 1992, and to allow

Mary Ann Neel to use the subject property for a use permitted at the time she acquired the property on February 2, 2001.

When Larry Allen Neel acquired the subject property on March 27, 1992, it was planned and zoned for Exclusive Farm Use (EFU) and subject to Jackson County's acknowledged EFU zone.² When Larry Allen Neel 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 then in effect.³ In 1986, ORS 215.263 (1991 edition) required that divisions of land in EFU zones be "appropriate for the continuation of the existing commercial agricultural enterprise within the area" or not smaller than the minimum size in the county's acknowledged plan. ORS 215.283(1)(f) (1985 edition) generally allowed farm dwellings "customarily provided in conjunction with farm use." Non-farm dwellings were allowed under ORS 215.283(3) if they were determined to be compatible with farm use, not interfere seriously with accepted farm practices, not materially alter the stability of the land use pattern in the area, and be situated on generally unsuitable land for the production of farm crops and livestock.

No information has been presented in the claim to establish whether the desired use of the subject property would have been permitted under the county's acknowledged plan and the provisions of ORS 215 in effect when Larry Allen Neel acquired the property.

At the time claimant Mary Ann Neel acquired an interest in the subject property on February 2, 2001, it was zoned WR by Jackson County and subject to the current lot size and dwelling standards under Goal 4, ORS 215 and OAR 660, division 6, and as described above in Section V.(2) of this report.

In addition to the laws in effect when each of the claimants acquired the subject property, there may be other laws that apply to the claimants' use of the subject property that have not been identified in the claim. The department notes that ORS 215.730 and OAR 660, division 6, include standards for siting dwellings in forest zones. These provisions include fire protection standards for dwellings and for surrounding forest lands. ORS 197.352(3)(B) specifically exempts regulations "restricting or prohibiting activities for the protection of public health and safety, such as fire and building codes. . . ." Accordingly, siting standards for dwellings in forest zones in ORS 215.730 and OAR 660, division 6, are exempt under ORS 197.352(3)(B).

In some cases it will not be possible to know which laws apply to a use of subject property until there is a specific proposal for that use. When the claimants seek a building or development permit to carry out a specific use, it may become evident that other state laws apply to that use. In some cases, some of these laws may be exempt under ORS 197.352(3)(A) to (D). In addition, some of these laws may be exempt under ORS 197.352(3)(A) to (D) and will continue to apply to the property on that basis.

² Jackson County's EFU zone was acknowledged by the Commission for compliance with Goal 3 on May 16, 1983.

³ After the county's comprehensive plan and land use regulations were acknowledged by the Commission as complying with the statewide planning goals, the goals and implementing rules no longer applied directly to individual 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 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.

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 the 18.59-acre property into three parcels or to their development of a dwelling on the two resulting vacant parcels: applicable provisions of Goal 4, ORS 215 and OAR 660, divisions 6, enacted or adopted after each of the claimants acquired the subject property. These laws will not apply to the claimants only to the extent necessary to allow Larry Allen Neel to use the subject property for the use described in this report, and only to the extent that use was permitted when he acquired the property on March 27, 1992, and to allow Mary Ann Neel to use the subject property for the use described in this report, and only to the extent that use was permitted when she acquired the property on February 2, 2001. The department acknowledges that the relief to which the claimants are entitled under ORS 197.352: 1) may not allow Larry Allen Neel to use the subject property to the extent of the claimants' desired use, as that use is described in this report, and 2) will not allow Mary Ann Neel to use the property for the claimants' desired use.

2. The action by the State of Oregon provides the state's authorization to claimant Larry Allen Neel to use the property for the use described in this report, subject to the standards in effect on March 27, 1992. On that date, the property was subject to compliance with Jackson County's acknowledged EFU zone, and the applicable provisions of Goal 3, ORS 215 and OAR 660, division 5, then in effect.

The action by the State of Oregon provides the state's authorization to claimant Mary Ann Neel to use the property for the use described in this report, subject to the standards in effect on February 2, 2001. On that date, the property was subject to compliance with Jackson County's acknowledged WR zone, and the applicable provisions of Goal 4, ORS 215 and OAR 660, division 6, currently in effect.

3. To the extent that any law, order, deed, agreement or other legally enforceable public or private requirement provides that the subject property may not be used without a permit, license or other form of authorization or consent, the order will not authorize the use of the property unless the claimants first obtain that permit, license or other form of authorization or consent. Such requirements may include, but are not limited to: a building permit, a land use decision, a "permit" as defined in ORS 215.402 or 227.160, other permits or authorizations from local, state or federal agencies and restrictions on the use of the subject property imposed by private parties.

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

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

VII. COMMENTS ON THE DRAFT STAFF REPORT

The department issued its draft staff report on this claim on July 7, 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.