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 John A. and Barbara J. McMahon, CLAIMANTS	))))	FINAL ORDER CLAIM NO. M129440

Claimants: John A. and Barbara J. McMahon (the Claimants)

Property: Township 28S, Range 14W, Section 31CC, Tax lot 300
Coos 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 denied as to the remaining 3.97-acre portion of the subject property that the claimants desire to use for commercial use as to laws administered by DLCD and the Land Conservation and Development Commission (LCDC) for the reasons set forth in the DLCD 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 John and Barbara McMahon's division of one acre of the subject property into four parcels of not less than .25-acres in size and with a dwelling on each parcel, and division of the 3.97-acre portion of the subject property zoned as commercial into fourteen .25-acre parcels for the development of commercial uses: applicable provisions of Goal 14 and OAR 660-004-0040. These land use regulations will not apply to the claimants only to the extent necessary to allow them to use one acre of the subject property for the residential use described in this report, and only to the extent that use was permitted when they acquired the subject property in 1964.

2. The action by the State of Oregon provides the state's authorization to the claimants to use one acre of the subject property for the residential use described in this report, subject to the standards in effect when they acquired the subject property in 1964.

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

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

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

This Order is entered by the Director of the DLCD as a final order of DLCD and the Land Conservation and Development Commission under ORS 197.352, OAR 660-002-0010(8), and OAR 125, division 145, and by the 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 22nd day of November, 2006.

FOR the DEPARTMENT OF ADMINISTRATIVE SERVICES:

David Hartwig, Administrator
DAS, State Services Division
Dated this 22nd day of November, 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, 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."

ORS 197.352 (BALLOT MEASURE 37) CLAIM FOR COMPENSATION

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

November 22, 2006

STATE CLAIM NUMBER:	M129440
NAMES OF CLAIMANTS:	John A. and Barbara J. McMahon
MAILING ADDRESS:	PO Box 2069 Bandon, Oregon 97411
PROPERTY IDENTIFICATION:	Township 28S, Range 14W, Section 31CC Tax lot 300 Coos County
OTHER CONTACT INFORMATION:	Emmett R. McIntosh 33711 Oak Flat Road Agness, Oregon 97406
DATE RECEIVED BY DAS:	June 1, 2006
180-DAY DEADLINE:	November 28, 2006

I. SUMMARY OF CLAIM

The claimants, John and Barbara McMahon, seek compensation in the amount of $444,581 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 division of one acre of the subject property into four parcels of not less than .25-acres in size and with a dwelling on each parcel, and division of the 3.97-acre portion of the subject property zoned as commercial into fourteen .25-acre parcels for the development of commercial uses. The subject property is located at 50205 Highway 101, near Bandon, in Coos 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 in part. Department staff recommends that, in lieu of compensation, the requirements of the following state laws enforced by the Land Conservation and Development Commission (the Commission) or the department not apply to John and Barbara McMahon's division of one acre of the subject property into four parcels of not less than .25-acres in size and with a dwelling on each parcel, and division of the 3.97-acre portion of the subject property zoned as commercial into fourteen .25-acre parcels for the development of commercial uses: applicable provisions of Statewide Planning Goal 14 (Urbanization) and Oregon Administrative Rule (OAR) 660-004-0040. These laws will not

apply to the claimants only to the extent necessary to allow them to use one acre of the subject property for the residential use described in this report, and only to the extent that use was permitted when they acquired the property in 1964.

The department has further determined that the claim is not valid as to the remaining 3.97-acre portion of the subject property that the claimants desire to use for commercial use because the claimants have not identified any laws enforced by the Commission or the department that restrict the claimants' use of the subject property for commercial use. (See the complete recommendation in Section VI. of this report.)

III. COMMENTS ON THE CLAIM

Comments Received

On September 20, 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 June 1, 2006, for processing under OAR 125, division 145. The claim identifies Coos County's Commercial (C-1) zoning 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

The claimants, John and Barbara McMahon, acquired the 0.47-acre panhandle portion of tax lot 300 on May 26, 1964, and the remaining 4.5-acre portion of tax lot 300 on December 14, 1964, as reflected by warranty deeds included with the claim. On June 16, 1993, the claimants transferred the subject property into the McMahon Family Trust, a revocable trust, as reflected by a Memorandum of Revocable Living Trust Agreement and Revocable Living Trust Agreement included in the claim.[1] The Coos County Assessor's Office confirms the claimants' current ownership of the subject property.

Conclusions

The claimants, John and Barbara McMahon, are "owners" of the subject property as that term is defined by ORS 197.352(11)(C), as of May 26, 1964, for the 0.47-acre panhandle portion of tax lot 300, and December 14, 1964, for the remaining 4.5-acre portion of tax lot 300.

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 division of one acre of the subject property into four parcels of not less than .25-acres in size and with a dwelling on each parcel, and division of the 3.97-acre portion of the subject property zoned as commercial into fourteen .25-acre parcels for the development of commercial uses, and that the Coos County C-1 zoning prevents the desired use.

The claim is based on the provisions of state law that regulate uses on rural exceptions land. The claimants' property is zoned by Coos County for rural commercial use (C-1). The C-1 zone is consistent with Goal 14, which generally requires that land outside of urban growth boundaries be used for rural uses. The county's C-1 zone, which has been acknowledged by the Commission, permits the subject property to be used for rural commercial use.

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[1] Transfer of property to a revocable trust does not result in a change in ownership for purposes of ORS 197.352.

Goal 14 was effective on January 25, 1975, and requires that local comprehensive plans identify and separate urbanizable land from rural land in order to provide for an orderly and efficient transition from rural to urban land use. In 2000, as a result of a 1986 Oregon Supreme Court decision,[2] the Commission amended Goal 14 and adopted OAR 660-004-0040 (Application of Goal 14 to Rural Residential Areas), which was effective on October 4, 2000.

The claimants acquired the subject property on May 26, 1964, and December 14, 1964, prior to the adoption of the statewide planning goals and their implementing statutes and regulations.

Conclusions

The current zoning requirements and minimum lot size standards established by applicable provisions of Goal 14 and OAR 660-004-0040 were enacted or adopted after the claimants acquired the subject property in 1964 and do not allow the desired division of the subject property for rural residential use. These laws restrict the use of the subject property for residential use relative to the uses allowed when the claimants acquired the property and do not allow the claimants' division of one acre of the subject property into four 0.25-acre parcels for residential development. However, the claimants have not established how these laws restrict the claimants' desired use of 3.97 acres of the property for commercial use. The property is currently subject to the county's acknowledged C-1 zone, which specifically allows commercial use of the property. The claimants have not established that any laws enforced by the Commission or the department restrict their desired commercial 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 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 $444,581 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 property's value.

Conclusions

As explained in Section V.(1) of this report, the claimants are John and Barbara McMahon, who acquired the 0.47-acre panhandle portion of tax lot 300 on May 26, 1964, and the remaining 4.5-acre portion of tax lot 300 on December 14, 1964. 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, the claimants have not established that any laws enacted or adopted since the claimants acquired the subject property restrict the claimants' desired use of the 3.97-acre portion of the C-1 zoned subject property for commercial use. Therefore, the claimants have not

[2] *1000 Friends of Oregon v. LCDC (Curry County)*, 301 Or 447 (1986).

established that any laws have had the effect of reducing the property's fair market value of that portion of the subject property. The claimants have established that laws enacted or adopted since the claimants acquired the subject property restrict the claimants' desired use of one acre of the property for residential use. The claimants estimate that the effect of the regulations on the fair market value of the subject property is a reduction of $444,581.

Without an appraisal or other documentation and without an evaluation or determination of the extent to which the claimants' alleged reduction in value is due to the restrictions on the claimants' desired use of the subject property for residential use, it is not possible to substantiate the specific dollar amount by which the land use regulations have reduced the fair market value of the 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.

4. Exemptions Under ORS 197.352(3)

Findings of Fact

The claim is based on state land use regulations that restrict the use of the subject property, including Goal 14 and OAR 660-004-0040, which Coos County has implemented through its rural Commercial (C-1) zone. These regulations were adopted after the claimants acquired the subject 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 none of the general goal and rule restrictions on division of rural residential land or its use were in effect when the claimants acquired the subject property in 1964. As a result, these laws are not exempt under ORS 197.352(3)(E).

Laws in effect when the claimants 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 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 one or more 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 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 one acre of the subject property for residential use. The claimants have not established that any laws enforced by the Commission or the department restrict the claimants' desired commercial use of the remaining 3.97 acres of the subject property. The claim asserts that existing land use regulations enforced by the Commission or the department have the effect of reducing the fair market value of the subject property by $444,581. However, because the claim does not provide an appraisal or other relevant evidence demonstrating how 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 residential use of one acre of the subject 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 John and Barbara McMahon to use the subject property for a use permitted at the time they acquired the subject property in 1964.

Conclusions

Based on the record, the department finds that the claimants have not established how land use regulations enacted since they acquired the property restrict their desired use of 3.97 acres of the subject property for commercial use. Therefore, the department recommends that the claim be denied as to the 3.97-acre portion of the property for which the claimants desire commercial use. The department otherwise recommends that the claim be approved as to the claimants' desired division of one acre of the subject property for residential use, 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 John and Barbara McMahon's division of one acre of the subject property into four parcels of not less than .25-acres in size and with a dwelling on each parcel, and division of the 3.97-acre portion of the subject property zoned as commercial into fourteen .25-acre parcels for

the development of commercial uses: applicable provisions of Goal 14 and OAR 660-004-0040. These land use regulations will not apply to the claimants only to the extent necessary to allow them to use one acre of the subject property for the residential use described in this report, and only to the extent that use was permitted when they acquired the subject property in 1964.

2. The action by the State of Oregon provides the state's authorization to the claimants to use one acre of the subject property for the residential use described in this report, subject to the standards in effect when they acquired the subject property in 1964.

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 November 1, 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. No comments were received.