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 Richard and Glenda Gordon, CLAIMANTS	))))	FINAL ORDER CLAIM NO. M129647

Claimants: Richard and Glenda Gordon (the Claimants)

Property: Township 19S, Range 1W, Section 20, Tax lot 1405, Lane 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 laws administered by DLCD and the Land Conservation and Development Commission (LCDC) for the reasons set forth in the DLCD Report.

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 chapter 125, division 145, and by the Director for the State Services Division of the DAS as a final order of DAS under ORS 197.352, OAR chapter 125, division 145, and ORS chapter 293.

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

Michael Morrissey, Manager
DLCD, Measure 37 Services Division
Dated this 5th day of January, 2007.

FOR THE DEPARTMENT OF ADMINISTRATIVE SERVICES:

Lindsay A. Ball, Director
DAS, State Services Division
Dated this 5th day of January, 2007.

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 197.352, 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)

ORS 197.352 (BALLOT MEASURE 37) CLAIM FOR COMPENSATION

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

January 5, 2006

STATE CLAIM NUMBER:	M129647
NAMES OF CLAIMANTS:	Richard and Glenda Gordon
MAILING ADDRESS:	PO Box 404 Dexter, Oregon 97431
PROPERTY IDENTIFICATION:	Township 19S, Range 1W, Section 20 Tax lot 1405 Lane County
DATE RECEIVED BY DAS:	July 12, 2006
180-DAY DEADLINE:	January 8, 2007

I. SUMMARY OF CLAIM

The claimants, Richard and Glenda Gordon, seek compensation in the amount of $250,000 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 partition the 12.49-acre subject property into two one 7.49-acre parcel and one 5-acre parcel and to develop a dwelling on the resulting undeveloped parcel. The subject property is located at 38318 Harolds Road, near Dexter, in Lane 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 not valid because the claimants' desired use of the subject property was not permitted under the laws in effect when the claimants acquired the property in 1985. (See the complete recommendation in Section VI. of this report.)

III. COMMENTS ON THE CLAIM

Comments Received

On October 25, 2006, pursuant to Oregon Administrative Rule (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 July 12, 2006, for processing under OAR 125, division 145. The claim identifies Lane County's RR-10 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, Richard and Glenda Gordon, acquired the subject property on July 16, 1985, as reflected by a deed included with the claim. The Lane County Assessor's Office confirms the claimants' current ownership of the subject property.

Conclusions

The claimants, Richard and Glenda Gordon, are "owners" of the subject property as that term is defined by ORS 197.352(11)(C), as of July 16, 1985.

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 claim indicates that the claimants desire to divide the 12.49-acre subject property into one 7.49-acre parcel and one 5-acre parcel and to develop a dwelling on the resulting undeveloped parcel. It indicates that the current zoning prohibits the desired use.

The claim is based on the provisions of state law that regulate rural residential zoning. The claimants' property is zoned RR-10 by Lane County, consistent with Goal 14, which generally requires that land outside of urban growth boundaries be used for rural uses. The county's RR-10 zone was adopted on February 29, 1984, and requires a minimum of 10 acres for the creation of a new lot or parcel.

The rule states that if a county rural residential zone in effect on October 4, 2000, specifies a minimum lot size of two acres or more, the area of any new lot or parcel shall equal or exceed the minimum lot size that is already in effect (OAR 660-004-0040(7)(c)). Some relief from this provision is available for lots or parcels having more than one permanent habitable dwelling pursuant to OAR 660-004-0040(7)(h). The rule also provides that a county's minimum lot size requirement in a rural residential zone shall not be amended to allow a smaller minimum lot size without approval of an exception to Goal 14 (OAR 660-004-0040(6)). Because Lane County's rural residential zone was in effect on October 4, 2000, and requires a minimum lot size of 10 acres, the minimum lot size for any new lot or parcel must equal or exceed 10 acres.

The claimants acquired the subject property after the adoption of the statewide planning goals, but before the Commission acknowledged Lane County's land use regulations to be in compliance with statewide planning goals pursuant to ORS 197.250 and 197.251. The subject property was recognized as resource land when the claimants acquired it in 1985, and because the Commission had not acknowledged Lane County's plan and land use regulations when the claimants acquired the property, the statewide planning goals, and particularly Goals 3 (Agricultural Lands) and 4 (Forest Lands), in addition to Goal 14, would have applied directly to the claimants' property had they sought the desired use at the time they acquired the property.[1] Alternatively, the claimants would have been required to establish a basis for an exception to

[1] 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 acknowledgment of each county's land use regulations. *Perkins v. City of Rajneeshpuram*, 300 Or 1 (1985); *Alexanderson v. Polk County*, 289 Or 427, *rev den* 290 Or 137 (1980); *Sunnyside Neighborhood Assn. v. Clackamas County*, 280 Or 569 (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 directly applied to such local land use decisions. *Byrd v. Stringer*, 295 Or 311 (1983). However, statutory requirements continue to apply, and insofar as the state and local provisions are materially the same, the local provisions must be interpreted consistent with the substance of the goals and implementing rules. *Foster v. Polk County*, 115 Or App 475 (1992); *Kenagy v. Benton County*, 115 Or App 131 (1992).

compliance with those goals pursuant to the Goal 2 (Land Use Planning) exceptions process. However, through the county's acknowledgement process, the subject property was ultimately acknowledged as exception land pursuant to Goal 2, and zoned by the county for rural residential use. Therefore, while the county could now require that the property be evaluated as resource land, as would have been required in 1985, because of the property's ultimate designation as rural residential exceptions land, the county could also require that the claimants' desired use be subject to compliance with Goal 14.

The claim does not establish that the claimants' desired division of the subject property into one 5-acre parcel and one 7.49-acre parcel could have satisfied this standard. To the contrary, while the county's plan was not acknowledged for compliance with Goal 14 at the time the claimants acquired the property, when the county's plan was ultimately acknowledged for compliance with Goal 14 in 1990, the property retained its RR-10 zoning, which continued to require a minimum of 10 acres for the creation of a new lot or parcel. Thus, when the claimants acquired the property, it was zoned RR-10, which required a 10-acre minimum lot or parcel size. When the county's plan was acknowledged, the property remained RR-10. Accordingly, had the claimants sought the desired use in 1985, the county's application of its RR-10 zone, which applied to the property at that time and which was ultimately acknowledged to be in compliance with Goal 14, would have prohibited the claimants' desired division.

Conclusions

The minimum lot size requirements for rural residential lots or parcels established by Goal 14 and OAR 660-004-0040 were adopted after the claimants acquired the subject property in 1985 and do not allow the desired division of the property. However, when the claimants acquired the subject property in 1985, it was zoned by the county as RR-10, which would have prohibited the claimants' desired division. Although the statewide planning goals, and in particular, the general requirements of Goal 14, applied directly to the property, the county's implementation of that goal continued to prohibit the claimants' desired division. The claimants have not established that their desired use has been restricted by land use regulations enacted or adopted after they acquired the property relative to uses permitted when they 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 regulations (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 $250,000 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 market values, included in the claim.

Conclusions

As explained in Section V.(1) of this report, the claimants are Richard and Glenda Gordon who acquired the subject property on July 16, 1985. The claimants have not established that laws

enacted or adopted since they acquired the subject property restrict their desired use relative to uses permitted at the time the claimants acquired the property on July 16, 1985. Therefore, the claimants have not established that the property's fair market value has been reduced as a result of land use regulations enforced by the Land Use Conservation and Development Commission (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 14 and OAR 660-004-0040, which Lane County has implemented through its RR-10 zone. Goal 14 was in effect when the claimants acquired the property in 1985; OAR 660-004-0040 was adopted after the claimants acquired the property.

Conclusions

The state land use regulations enacted or adopted since the claimants acquired the subject property do not restrict their desired use relative to uses permitted at the time the claimants acquired the property on July 16, 1985. The claimants' desired use of the property was prohibited under the state and county land use regulations in effect in 1985. Therefore, the land use regulations that restrict the claimants' desired use of the property are exempt under ORS 197.352(3)(E), which exempts laws in effect when the claimants acquired 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 do not restrict the claimants' desired use of the subject property relative to what was permitted when the claimants acquired it in 1985 and do not reduce the fair market value of the property.

Conclusions

Based on the record and the foregoing findings and conclusions, the claimants have not established that they are entitled to relief under ORS 197.352(1) as a result of land use regulations enforced by the Commission or the department because the claimants' desired use was not permitted at the time they acquired the property in 1985. Therefore, the department recommends that this claim be denied.

VII. COMMENTS ON THE DRAFT STAFF REPORT

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