

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 )      FINAL ORDER  
COMPENSATION UNDER ORS 197.352 )      CLAIM NO. M129959  
(BALLOT MEASURE 37) OF )  
Orean and Ruby Peevy, CLAIMANTS )

Claimants:      Orean and Ruby Peevy (the Claimants)

Property:      Township 9S, Range 1W, Section 24, Tax lot 100, Linn County  
(the property)

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

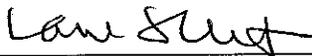
Claimants submitted the Claim to the State of Oregon under ORS 197.352. Under OAR 125-145-0010 *et seq.*, the Department of Administrative Services (DAS) referred the Claim to the Department of Land Conservation and Development (DLCD) as the regulating entity. This order is based on the record herein, 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

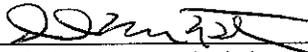
The Claim is denied as to laws administered by DLCD and the Land Conservation and Development Commission (LCDC) for the reasons set forth in the DLCD Report.

This Order is entered by the 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 chapter 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 chapter 125, division 145, and ORS chapter 293.

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

  
\_\_\_\_\_  
Cora R. Parker, Deputy Director  
DLCD  
Dated this 22<sup>nd</sup> day of February, 2007.

FOR the DEPARTMENT OF  
ADMINISTRATIVE SERVICES:

  
\_\_\_\_\_  
David Hartwig, Administrator  
DAS, State Services Division  
Dated this 22<sup>nd</sup> day of February, 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**

February 22, 2007

**STATE CLAIM NUMBER:** M129959

**NAMES OF CLAIMANTS:** Orean and Ruby Peevy

**MAILING ADDRESS:** 41568 Kingston Lyons Drive SE  
Stayton, Oregon 97383

**PROPERTY IDENTIFICATION:** Township 9S, Range 1W, Section 24  
Tax lot 100  
Linn County

**DATE RECEIVED BY DAS:** August 31, 2006

**180-DAY DEADLINE:** February 27, 2007

**I. SUMMARY OF CLAIM**

The claimants, Orean and Ruby Peevy, seek compensation in the amount of \$125,000 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 2.63-acre subject property into two parcels for residential development. The subject property is located at 41568 Kingston Lyons Drive SE, near Stayton, in Linn 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 neither the Land Conservation and Development Commission (the Commission) nor the department has enforced laws that restrict the claimants' use of the private real property relative to uses permitted when the claimants acquired the property, and no laws enforced by the Commission or the department have the effect of reducing the property's fair market value. (See the complete recommendation in Section VI. of this report.)

**III. COMMENTS ON THE CLAIM**

**Comments Received**

On December 1, 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, one written comment was received in response to the 10-day notice.

The comment does not address whether the claim meets the criteria for relief under ORS 197.352. Comments concerning the effects a use of the subject property may have on surrounding areas are generally not something that the department is able to consider in determining whether to waive a state law. If funds do become available to pay compensation, then such effects may become relevant in determining which claims to pay compensation for instead of waive a state law. (See the comment letter in the department's claim file.)

#### **IV. TIMELINESS OF CLAIM**

##### **Requirement**

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

1. For claims arising from land use regulations enacted prior to the effective date of Measure 37 (December 2, 2004), within two years of that effective date, or the date the public entity applies the land use regulation as an approval 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 August 31, 2006, for processing under OAR 125, division 145. The claim identifies Linn County's Rural Residential (RR5) zone 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, Orean and Ruby Peevy, acquired a 1.68-acre portion of the subject property on January 10, 1975, as reflected by a warranty deed included with the claim. The claimants

acquired an additional 0.95-acre portion of the subject property on April 14, 1981, as reflected by a warranty deed included with the claim.<sup>1</sup> The Linn County Assessor's Office confirms the claimants' current ownership of the subject property.

## **Conclusions**

The claimants, Orea and Ruby Peevy, are "owners" of the subject property as that term is defined by ORS 197.352(11)(C), as of January 10, 1975, for the 1.68-acre portion and as of April 14, 1981, for the 0.95-acre portion of the subject property.

## **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 2.63-acre subject property into two parcels for residential development, and 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 RR5 by Linn County, consistent with Goal 14, which generally requires that land outside of urban growth boundaries be used for rural uses. The county's RR5 zone was adopted on September 2, 1980, in order to comply with Goal 14, and requires a minimum of five acres for the creation of a new lot or parcel.

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,<sup>2</sup> 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 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 Linn County's

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<sup>1</sup> When the claimants originally acquired tax lot 100, it consisted of 1.68 acres. They acquired the additional 0.95 acre of the subject property (tax lot 109) in 1981 and combined the two properties into one legal lot of record in 1996, as reflected by information from Linn County's Planning and Building Department.

<sup>2</sup> *1000 Friends of Oregon v. LCDC (Curry County)*, 301 Or 447 (1986).

rural residential zone was in effect on October 4, 2000, and requires a minimum lot size of five acres, the minimum lot size for any new lot or parcel must equal or exceed five acres.

The claimants acquired the subject property after the adoption of the statewide planning goals, but before the Commission acknowledged Linn County's land use regulations to be in compliance with statewide planning goals pursuant to ORS 197.250 and 197.251. When the claimants acquired the 1.68-acre portion of the subject property on January 10, 1975, it was zoned by Linn County as Agriculture, Residential and Timber (ART), which established a 5-acre minimum for the creation of new lots or parcels. When the claimants acquired the 0.95-acre portion of the subject property on April 14, 1981, it was zoned by Linn County as R-1, which established a 1-acre minimum lot size requirement.

However, because the county's acknowledged plan and land use regulations had not been acknowledged by the Commission when the claimants acquired the subject property in 1975 and 1981, all of the subject property was recognized as resource land when the claimants acquired it. Accordingly, 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.<sup>3</sup> Alternatively, the claimants would have been required to establish a basis for an exception to 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 exceptions land pursuant to Goal 2, and zoned by the county for rural residential use, which required a five-acre minimum lot or parcel size. Therefore, while the county could now require that the property be evaluated as resource land, as would have been required in 1975 and 1981, 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 directly with Goal 14.<sup>4</sup>

The claim does not establish that the claimants' desired division of the 1.68-acre portion of the property would have been allowed at the time they acquired it in 1975; nor does it establish that their desired division of the 0.95-acre portion of the property would have been permitted at the time they acquired it in 1981. To the contrary, the claimants' desired use would not have been permitted under the county's zoning of those portions of the property and its direct application of the Goals, in effect and applicable to the property when the claimants acquired it.

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<sup>3</sup> 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).

<sup>4</sup> Linn County's plan was acknowledged for compliance with Goal 14 on September 9, 1993.

## **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 1975 and 1981. However, based on the record before the department, the claimants' desired use of the subject property was also prohibited by the zoning in effect when they acquired the property in 1975 and 1981. The claim does not establish any state laws enforced by the Commission or the department that restrict the claimants' desired use of the subject property relative to uses permitted when the claimants acquired the property in 1975 and 1981.

### **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 \$125,000 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 value.

## **Conclusions**

As explained in Section V.(1) of this report, the claimants are Orea and Ruby Peevy, who acquired a portion of the subject property in 1975 and a portion of it in 1981. The claimants have not established their entitlement to compensation under ORS 197.352. Rather, as explained in Section V.(2), the claimants' desired use of the property was prohibited by the zoning in effect at the time they acquired the property. Accordingly, because the claimants' desired use was prohibited by the county when they acquired the property, state land use regulations enacted or adopted by the Commission or the department since the claimants acquired the property do not have the effect of reducing the fair market value of the property relative to uses allowed in 1975 and 1981.

### **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 Goal 14 and OAR 660-004-0040, which Linn County has implemented through its RR5 zone. With the exception of provisions of Goal 14, adopted before the claimants acquired the 1.68-acre portion of the subject property on January 10, 1975, and the 0.95-acre portion of the subject property on April 14, 1981, these state land use regulations were not in effect when 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 the goal and rule restrictions on residential division of the claimants' property are not exempt under ORS 197.352(3)(E) to the extent they were adopted after the claimants acquired the property. However, as discussed in Section V.(2) of this report, these laws do not restrict the claimants' desired use of the subject property relative to uses permitted when they acquired the property in 1975 and 1981 because the claimants' desired use was prohibited by the zoning in effect when they acquired the 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, neither the Commission nor the department has enforced laws enacted or adopted after the claimants acquired the subject property that restrict the claimants' use of the subject property relative to uses permitted when they acquired the property because the claimants' desired use of the property was not permitted at the time they acquired it. Therefore, no laws enforced by the Commission or the department have the effect of reducing the property's fair market value.

## **Conclusions**

Based on the record before the department, the claimants, Orea and Ruby Peevy, 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. The department recommends that this claim be denied because the claimants' desired use of the property was prohibited under the zoning in effect when they acquired the property in 1975 and 1981.

## **VII. COMMENTS ON THE DRAFT STAFF REPORT**

The department issued its draft staff report on this claim on February 1, 2007. 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.