

BEFORE THE DEPARTMENT OF ADMINISTRATIVE SERVICES,
THE DEPARTMENT OF LAND CONSERVATION AND DEVELOPMENT AND
THE BOARD AND DEPARTMENT OF FORESTRY

IN THE MATTER OF THE CLAIM FOR) FINAL ORDER
COMPENSATION UNDER ORS 197.352) CLAIM NO. M129616
(BALLOT MEASURE 37) OF)
Ronald M. and Carol P. Watson, CLAIMANTS)

Claimants: Ronald M. and Carol P. Watson (the Claimants)

Property: Township 3S, Range 3E, Section 8B, Tax lot 2600, Clackamas 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), and the Oregon Department of Forestry (the ODF Report), attached to and by this reference incorporated into this order.

ORDER

The Claim is denied as to laws administered by the Oregon Department of Forestry or the Oregon Board of Forestry, for the reasons set forth in the ODF 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 Ronald and Carol Watson's division of the 9.51-acre subject property into two to four parcels or to their development of a dwelling on each resulting undeveloped parcel: applicable provisions of Goal 4, ORS 215 and OAR 660, division 6, enacted or adopted after May 11, 1971. These land use regulations will not apply to the claimants only to the extent necessary to allow them to use the subject property for the use described in this report, and only to the extent that use was permitted when they acquired the property on May 11, 1977.

2. The action by the State of Oregon provides the state's authorization to the claimants to use the subject property for the use described in this report, subject to the standards in effect on May 11, 1977. On that date, the property was subject to compliance with land division and dwelling standards under Goal 4.

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.

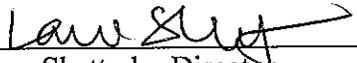
4. Any use of the subject property by the claimants under the terms of the order will remain subject to the following laws: (a) those laws not specified in (1) above; (b) any laws enacted or enforced by a public entity other than the Commission or the department; and (c) those laws not subject to ORS 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.

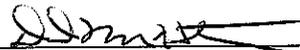
This Order is entered by the Director of the DLCD as a final order of DLCD and the Land Conservation and Development Commission under ORS 197.352, OAR 660-002-0010(8), and OAR 125, division 145, and by the Administrator for the State Services Division of the DAS as a final order of DAS under ORS 197.352,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

This Order is entered by the Oregon Board and Department of Forestry as a final order of the Board under ORS 197.352, OAR 629-001-0057, and OAR Chapter 125, division 145.

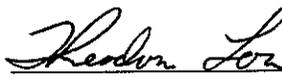
FOR DLCD AND THE LAND
CONSERVATION AND DEVELOPMENT
COMMISSION:


Lane Shetterly, Director
DLCD
Dated this 29th day of December, 2006.

FOR THE DEPARTMENT OF
ADMINISTRATIVE SERVICES:


David Hartwig, Deputy Administrator
DAS, State Services Division
Dated this 29th day of December, 2006.

FOR THE OREGON BOARD OF
FORESTRY AND THE OREGON
DEPARTMENT OF FORESTRY:


Theodore Lorensen, Acting State Forester
ODF
Dated this 29th day of December, 2006

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)

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

December 29, 2006

STATE CLAIM NUMBER: M129616

NAMES OF CLAIMANTS: Ronald M. and Carol P. Watson

MAILING ADDRESS: PO Box 177
Oregon City, Oregon 97045

PROPERTY IDENTIFICATION: Township 3S, Range 3E, Section 8B
Tax lot 2600
Clackamas County

OTHER CONTACT INFORMATION: Mary W. Johnson, Attorney
500 Abernathy Road, Suite 4
Oregon City, Oregon 97045

DATE RECEIVED BY DAS: July 3, 2006

180-DAY DEADLINE: December 30, 2006

I. SUMMARY OF CLAIM

The claimants, Ronald and Carol Watson, seek compensation in the amount of \$722,234 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 9.51-acre subject property into two to four parcels, to develop a dwelling on each resulting undeveloped parcel and to continue timber use on the remaining undeveloped portion of the property. The subject property is located at 19001 South Sprague Lane, near Oregon City, in Clackamas 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 Ronald and Carol Watson's division of the 9.51-acre subject property into two to four parcels and to their development of a dwelling on each resulting undeveloped parcel: applicable provisions of Statewide Planning Goal 4 (Forest Lands), ORS 215 and Oregon

Administrative Rules (OAR) 660, division 6, enacted or adopted after May 11, 1977.¹ These laws will not apply to the claimants only to the extent necessary to allow them to use the subject property for the use described in this report, and only to the extent that use was permitted when they acquired the property on May 11, 1977. (See the complete recommendation in Section VI. of this report.)

III. COMMENTS ON THE CLAIM

Comments Received

On October 10, 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 July 3, 2006, for processing under OAR 125, division 145. The claim identifies Goals 4 and 14 (Urbanization); OAR 660; provisions of ORS 215 and 527; ORS 526; and Clackamas County's comprehensive plan and subsequent zoning laws as the basis for the claim.² Only laws that were enacted or adopted prior to December 2, 2004, are the basis for this claim.

¹ The claimants also wish to continue timber use of the undeveloped portion of the property. That aspect of the claimants' desired use and claim is addressed in a separate report by the Oregon Department of Forestry (ODF), and that use is consistent with and not restricted by land use regulations administered by the department.

² This report addresses only those state statutes and rules administered by the department. Statutes and rules administered by ODF (ORS 526 and 527.610 et seq.) are addressed in a report by that agency.

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, Ronald and Carol Watson, acquired the subject property on May 11, 1977, as reflected by a warranty deed included with the claim. The Clackamas County Assessor’s Office confirms the claimants’ current ownership of the subject property.

Conclusions

The claimants, Ronald and Carol Watson, are “owners” of the subject property as that term is defined by ORS 197.352(11)(C), as of May 11, 1977.

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 divide the 9.51-acre subject property into two to four parcels and to develop a dwelling on each resulting undeveloped parcel. It indicates that the desired use is not allowed under current land use regulations.

The claim is based generally on the applicable provisions of state law that require forest zoning and restrict uses on forest-zoned land. The claimants’ property is zoned Timber District (TBR) by Clackamas County, 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 acquired the subject property after the adoption of the statewide planning goals but before the Commission acknowledged the Clackamas County's land use regulations to be in compliance with the statewide planning goals pursuant to ORS 197.250 and 197.251. Because the Commission had not acknowledged the county's plan and land use regulations when the claimants acquired the subject property on May 11, 1977, the statewide planning goals, and Goal 4 in particular, applied directly to the claimants' property when they acquired it.³

Goal 4 went into effect on January 25, 1975, and was intended to "conserve forest lands for forest uses" and required, "Lands suitable for forest uses shall be inventoried and designated as forest lands. Existing forest land uses shall be protected unless proposed changes are in conformance with the comprehensive plan." Those forest uses were defined as follows: "(1) the production of trees and the processing of forest products; (2) open space, buffers from noise, and visual separation of conflicting uses; (3) watershed protection and wildlife and fisheries habitat; (4) soil protection from wind and water; (5) maintenance of clean air and water; (6) outdoor recreational activities and related support services and wilderness values compatible with these uses; and (7) grazing land for livestock." Specifically, Goal 4 only allowed land divisions that would protect commercial forest lands for commercial forest uses. Dwellings in forest zones could only be allowed if found to be "necessary and accessory" to one of the enumerated forest uses listed in Goal 4.⁴

The claimants also cite Goal 14 and the rural residential rules at OAR 660-004-0040(8) as restricting their desired use. Goal 14 would likely apply to the claimants' division of the property into parcels of less than two acres. The claimants' desired use does not include such a division and the claim itself states that the desired use is rural in nature. The rural residential rules, OAR 660-004-0040, apply to property zoned for rural residential development. The claimants have not established how those rules apply to the subject TBR-zoned property.

No information has been presented in the claim to establish that the claimants' desired division of the 9.51-acre subject property into two to four parcels and their development of a dwelling on

³ 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 3 (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).

⁴ Goal 4 prohibited uses that were not enumerated by Goal 4 as permissible uses for forest lands as well as those that were not necessary and accessory to an enumerated forest use. *Lamb v. Lane County*, 7 Or LUBA 137 (1983). Dwellings in forest lands were required to be "necessary and accessory" to show that such dwellings complied with the Goal 4 requirement that local land use regulations must "conserve forest lands for forest uses." *1000 Friends v. LCDC (Curry County)*, 301 Or 447 (1986). A dwelling that may "enhance" forest uses is not "necessary and accessory" to a forest use to the extent required by Goal 4. *1000 Friends of Oregon v. LCDC (Lane County)*, 305 Or 384 (1988). For additional guidance, the Goal 4 provisions were interpreted under OAR 660, division 6, effective on September 1, 1982, in *1000 Friends of Oregon v. LCDC (Lane County)* and in *1000 Friends v. LCDC (Curry County)*.

each resulting undeveloped parcel comply with the Goal 4 standards described above, which were in effect when the claimants acquired the subject property in 1977.

Conclusions

The current zoning requirements, minimum lot size and dwelling standards established pursuant to Goal 4, ORS 215.705 to 215.755 and 215.780 and OAR 660-006-0026 and 660-006-0027 were all enacted or adopted after the claimants acquired the subject property in 1977 and do not allow the claimants' desired division or development of the property. However, the claim does not establish whether or to what extent the claimants' desired use of the subject property complies with the standards for land divisions and development under Goal 4 in effect when the claimants acquired the property on May 11, 1977. In addition, the claim fails to establish that Goal 14 or OAR 660-004-0040 apply to or restrict the claimants' desired use of the property.

This report addresses only those state laws that are identified in the claim, or that the department is certain apply to the subject property, based on the uses that the claimants have identified. There may be other laws that currently apply to the claimants' use of the subject property, and that may continue to apply to the claimants' use of the property, that have not been identified in the claim. In some cases, it will not be possible to know which laws apply to a use of the 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.

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 \$722,234 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 a comparative market analysis included with the claim.

Conclusions

As explained in Section V.(1) of this report, the claimants are Ronald and Carol Watson who acquired the subject property on May 11, 1977. 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 acquired the subject property restrict the claimants' desired use of the property. The claimants estimate that the effect of the land use regulations on the fair market value of the subject property is a reduction of \$722,234.

Without an appraisal or other documentation, and without verification of whether or the extent to which the claimants' desired use of the subject property was allowed under the standards in effect when they acquired the property, 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)

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 4, ORS 215 and OAR 660, division 6, which Clackamas County has implemented through its current TBR zone. With the exception of provisions of Goals 4 and 14 adopted before the claimants acquired the subject property on May 11, 1977, these state land use regulations were not in effect when the claimants acquired the property.

Conclusions

Without a specific development proposal for the subject property, it is not possible for the department to determine all the laws that may apply to a particular use of the property, or whether those laws may fall under one or more of the exemptions under ORS 197.352. It appears that the general statutory, goal and rule restrictions on residential division and development of the subject property are not exempt under ORS 197.352(3)(E) only to the extent they were enacted or adopted after the claimants acquired the property. Provisions of Goals 4 and 14 in effect when the claimants acquired the subject property in 1977 are exempt under ORS 197.352(3)(E) and will continue to apply to the property.

Other laws in effect when the claimants acquired the subject property are exempt under ORS 197.352(3)(E) and will also continue to apply to the claimants' use of the property. In addition, 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).

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 the 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 currently apply to that use and may continue to 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 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.

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 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 \$722,234. 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 Ronald and Carol Watson to use the subject property for a use permitted at the time they acquired the property on May 11, 1977.

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 Ronald and Carol Watson's division of the 9.51-acre subject property into two to four parcels or to their development of a dwelling on each resulting undeveloped parcel: applicable provisions of Goal 4, ORS 215 and OAR 660, division 6, enacted or adopted after May 11, 1971. These land use regulations will not apply to the claimants only to the extent necessary to allow them to use the subject property for the use described in this report, and only to the extent that use was permitted when they acquired the property on May 11, 1977.

2. The action by the State of Oregon provides the state's authorization to the claimants to use the subject property for the use described in this report, subject to the standards in effect on May 11, 1977. On that date, the property was subject to compliance with land division and dwelling standards under Goal 4.

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 December 12, 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.

ORS 197.352 (BALLOT MEASURE 37) CLAIM FOR COMPENSATION

OREGON DEPARTMENT OF FORESTRY

Final Staff Report and Decision

December 29, 2006

STATE CLAIM NUMBER: M129616

NAMES OF CLAIMANTS: Ronald M. and Carol D. Watson

MAILING ADDRESS: PO Box 177
Oregon City, Oregon 97045

PROPERTY IDENTIFICATION: Township 3S, Range 3E, Section 8B
Tax lot 2600
Clackamas County, aka
19001 S. Sprague Lane
Oregon City, Oregon 97045

OTHER CONTACT INFORMATION: Mary W. Johnson, Attorney
500 Abernethy Road, Ste. 4
Oregon City, Oregon 97045

DATE RECEIVED BY DAS: July 3, 2006

180-DAY DEADLINE: December 30, 2006

I. SUMMARY OF CLAIM

See Department of Land Conservation and Development (DLCD) Staff Report.

II. SUMMARY OF STAFF RECOMMENDATION

Based on the findings and conclusions set forth below, the Department of Forestry (ODF) has determined the claim is not valid as to land use regulations administered by ODF or the Oregon Board of Forestry (Board) because the department has not taken any action to enforce any land use regulation to restrict the claimants' use of the property on or after December 2, 2004, and because none of the laws identified in the claim and administered by the Board or ODF restrict the claimants' right to divide the 9.51-acre property into up to four parcels and to develop a dwelling on each parcel. One of the claimants' desired uses is to continue timber operations on the undeveloped portion of the property. To the extent that the claimants intend to carry out a "forest operation" (a commercial activity relating to the establishment, management or harvest of forest tree species), claimants have not submitted a written notification as required by law. Without a notification ODF is unable to determine whether the laws listed in the claim apply to the claimants' use of the property or restrict their use of the property. ODF has not enforced an

existing state land use regulation with respect to the claimants' use of the property. In addition, ORS 527.730 provides that "[n]othing in the Oregon Forest Practices Act shall prevent the conversion of forestland to any other use." (See the complete recommendation in Section VI. of this report.)

III. COMMENTS ON THE CLAIM

Comments Received

See DLCD Staff Report.

IV. TIMELINESS OF CLAIM

Findings of Fact

This claim was submitted to DAS on July 3, 2006, for processing under OAR 125, division 145. The claim identifies a list of statutes and rules, which includes ORS 526 and 527.610 *et seq.* 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

ODF adopts the findings of fact and conclusions of law regarding ownership contained in the DLCD Staff Report for this claim.

2. The Laws That are the Basis for This Claim

In order to establish a valid claim, Section 1 of Ballot Measure 37 requires, in part, that a state land use regulation must restrict the claimants' desired use of private real property, and that the enactment or enforcement of the regulation has had the effect of reducing the fair market value of the property.

Findings of Fact

The claim indicates the claimants' desire to divide the 9.51-acre subject property into two to four parcels for residential development and to continue timber use except on the homesites. The claim lists the following state statutes administered by ODF or the Board as laws that restrict the use of the property as the basis for the claim: ORS 526 and 527.610 *et seq.* and the Forest

Practices Act.¹ The claim states that the listed regulations prohibit “additional dwelling or land division.” The property is zoned F/F, a mixed agricultural and forest land zone. The laws listed in the claim include statutes that only apply to forest operations, which is one of the uses the claimants have described in their claim.

Certain uses of property are forest “operations” that are regulated under the Forest Practices Act. If trees are harvested for commercial use, some laws listed in the claim will apply to the operation. A notification of intent to conduct a forest operation is required in order for ODF to determine whether laws it or the Board may enforce apply to the claimants’ intended use of the subject property in a way that restricts the use of the subject property, and reduces its fair market value. No notification has been made on or since December 2, 2004, the effective date of Measure 37.

One of the cited laws, ORS 527.730, Conversion of forestland to other uses, states, “Nothing in the Oregon Forest Practices Act shall prevent the conversion of forestland to any other use.” No laws enforced by the Board or ODF restrict the division of the property or the establishment of dwellings.

Conclusions

Persons proposing to conduct a forest operation are required to submit a notification of the operation to ODF. Nothing in ORS 197.352 relieves an operator or landowner from this obligation, and until a notification is submitted, ODF is unable to determine whether laws it or the Board administers would apply to or restrict the harvest of any and all timber.

In addition, nothing in the laws that are listed in the claim and enforced or administered by ODF or the Board applies to or restricts the division of the property or the construction of dwellings by the claimants.

3. Effect of Regulations on Fair Market Value

In order to establish a valid claim, Section 1 of Ballot Measure 37 requires that any land use regulation 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 claimants have not demonstrated that any land use regulations administered by ODF or the Board restrict their use of the subject property or have the effect of reducing its fair market value. The documentation submitted with the claim does not include any information concerning how laws administered by ODF or the Board have had the effect of reducing the fair market value of the property.

Until the claimants submit a notification, ODF is unable to determine whether any laws apply to or may restrict the claimants’ desired use of the property or reduce its fair market value.

¹ The claim identifies other laws administered by the Oregon Department of Land Conservation and Development (DLCD). Those laws are addressed in a separate report by that agency.

Conclusions

The claimants have not demonstrated that laws enforced or administered by ODF or the Board apply to or restrict their desired use of this property or affect its fair market value.

4. Exemptions Under Section 3 of Measure 37

Ballot Measure 37 does not apply to certain land use regulations. In addition, under Section 3 of the Measure, certain types of laws are exempt from the Measure.

Findings of Fact

ORS 197.352(3) exempts laws that were enacted before claimants acquired their interest in the property. Claimants Ronald and Carol Watson acquired an interest in the subject property on May 11, 1977. Most forest practice laws were first enacted in 1971 and July 1, 1972, although some date back to 1941. Additions and amendments were made to the statutes and rules since that time. ODF is unable to determine whether 197.352(3)(E) or other exemptions in 197.352(3) may apply because the claimants have not submitted a notification of operations to conduct commercial forest activities on the subject property.

Some FPA regulations were enacted to control water pollution resulting from forest operations. ORS 197.352(3)(B) specifically exempts regulations "restricting or prohibiting activities for the protection of public health and safety..., including pollution control." Such regulations may apply to the property, depending upon the activities the claimants may wish to undertake.

Other FPA regulations cited by the claimants may also be exempted under 197.352(3).

Conclusions

ODF concludes that some of the listed land use regulations are likely exempt under ORS 197.352(3). Until there is a notification of an operation, however, a final determination of the applicability of the listed laws to a particular forest operation on the property cannot be made.

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 (FPA 1975 edition). 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 claimants submit a notification of intent to conduct a commercial forest operation. When the claimants submit a notification, 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 (3)(D).

This report addresses only those state laws that are identified in the claim, or that ODF 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 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.

VI. FORM OF RELIEF

Based on the current record, the claimants are not entitled to relief under ORS 197.352 from ODF or the Board. ODF staff denies this claim because ODF has not taken any action to enforce any land use regulation to restrict the claimants' desired use of the property on or after December 2, 2004, and because the ODF is unable to determine that the statutes identified in the claim apply to or restrict the claimants' desired use of the property, or have had the effect of reducing the fair market value of the property.

VII. NOTICE OF OPPORTUNITY TO COMMENT

ODF issued its draft staff report on this claim on December 12, 2006. OAR 125-145-0100(3), provides an opportunity for the claimant or the claimant's authorized agent and any third parties who submitted comments under OAR 125-145-0080 to submit written comments, evidence and information in response to the draft staff report and recommendation. Comments received have been taken into account by the department in the issuance of this final report.