

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. M118400
(BALLOT MEASURE 37) OF)	
John and Patsy Paulin, CLAIMANTS)	

Claimants: John and Patsy Paulin (the Claimants)

Property: Tax lot 501, Township 1N, Range 10E, Section 16, Hood River County
(the Property)

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

Claimants submitted the Claim to the State of Oregon under ORS 197.352. Under OAR 125-145-0010 *et seq.*, the Department of Administrative Services (DAS) referred the Claim to the Department of Land Conservation and Development (DLCD) as the regulating entity. This order is based on the record herein, including the Findings and Conclusions set forth in the Final Staff Report and Recommendation of DLCD (the DLCD Report) attached to and by this reference incorporated into this order.

ORDER

The Claim is approved as to laws administered by DLCD and the Land Conservation and Development Commission (LCDC) for the reasons set forth in the DLCD Report, and subject to the following terms:

Based on the record, the department recommends that the claim be approved, subject to the following terms.

1. In lieu of compensation under ORS 197.352, the State of Oregon will not apply the following laws to the claimants' division of the 15-acre property into two, 2.5-acre parcels: applicable provisions of ORS 215 and OAR 660 division 6 enacted after the claimants acquired their respective interest in the property. These land use regulations will not apply to Ms. Paulin's use of her property only to the extent necessary to allow her to use the property as described in this report, and only to the extent that use was permitted at the time she acquired the property on August 6, 1976; and will not apply to Mr. Paulin's use of the property only to the extent necessary to allow him to use the property for the use described in this report, to the extent permitted when he acquired the property on November 10, 1986. The department acknowledges that the relief to which Mr. Paulin is entitled under ORS 197.352 will not allow him to use the property in the manner set forth in the claim.

2. The action by the State of Oregon provides the state's authorization to Patsy Paulin, to use her property for the use described in this report, subject to the standards in effect on August 6, 1976. On that date, the property was subject to applicable provisions of ORS 215 and

Statewide Planning Goal 4; and to John Paulin, to use the property for the use described in this report, subject to the standards in effect on November 10, 1986. On that date, the property was subject to Hood River County's forest zoning (40-acre minimum lot size).

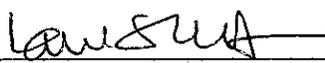
3. To the extent that any law, order, deed, agreement or other legally enforceable public or private requirement provides that the property may not be used without a permit, license, or other form of authorization or consent, the order will not authorize the use of the property unless the claimants first 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 ORS 227.160, other permits or authorizations from local, state or federal agencies, and restrictions on the use of the property imposed by private parties.

4. Any use of the 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 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 property by the claimants.

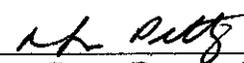
This Order is entered by the Director of the DLCD as a final order of DLCD and the Land Conservation and Development Commission under ORS 197.352, OAR 660-002-0010(8), and OAR 125, division 145, and by the Deputy Administrator for the State Services Division of the DAS as a final order of DAS under ORS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

FOR DLCD AND THE LAND CONSERVATION AND DEVELOPMENT COMMISSION:



Lane Shetterly, Director
DLCD
Dated this 17th day of March, 2006.

FOR the DEPARTMENT OF ADMINISTRATIVE SERVICES:



Dugan Petty, Deputy Administrator
DAS, State Services Division
Dated this 17th day of March, 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 293.316:** Judicial review under ORS 293.316 may be obtained by filing a petition for review within 60 days from the service of this order. Judicial review under ORS 293.316 is pursuant to the provisions of ORS 183.482 to the Court of Appeals.
2. **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 and the Circuit Court in the county in which you reside.
3. **A cause of action under Oregon ORS 197.352:** A present owner of the property, or any interest therein, may file a cause of action in the Circuit Court for the county where the property is located, if a land use regulation continues to apply to the subject property more than 180 days after the present owner made a written demand for compensation.

(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.”

**BALLOT MEASURE 37 (ORS 197.352)
CLAIM FOR COMPENSATION**

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

March 17, 2006

STATE CLAIM NUMBER: M118400

NAMES OF CLAIMANTS: John and Patsy Paulin

MAILING ADDRESS: 11500 Northeast 76th Street A-3
Vancouver, Washington 98662

PROPERTY IDENTIFICATION: Township 1N, Range 10E, Section 16
Tax lot 501
Hood River County

DATE RECEIVED BY DAS: May 9, 2005

180-DAY DEADLINE: March 24, 2006¹

I. SUMMARY OF CLAIM

The claimants, John and Patsy Paulin², seek compensation in the amount of \$400,000 for the reduction in fair market value as a result of certain land use regulations that are alleged to restrict the use of certain private real property. The claimants desire compensation or the right to divide part of their 15-acre property into two, 2.5-acre lots. The property is located at 4530 Baldwin Creek Drive, near Parkdale, in Hood River County. (See claim.)

II. SUMMARY OF STAFF RECOMMENDATION

Based on the findings and conclusions set forth below, the Department of Land Conservation and Development (the department) has determined that the claim is valid. Department staff recommends that, in lieu of compensation, the requirements of the following state laws enforced by the Land Conservation and Development Commission (the Commission) or the department not apply to the claimants' division of the property: applicable provisions of Statewide Planning Goal 4, ORS 215, and OAR 660, division 6, enacted after the claimants acquired their interests in the property. These laws will not apply to Ms. Paulin only to the extent necessary to allow

¹ This date reflects 180 days from the date the claim was submitted as extended by the 139 days enforcement of Measure 37 was suspended during the pendency of the appeal of Macpherson v. Dep't of Admin. Servs., 340 Or ___, 2006 Ore. LEXIS 104 (February 21, 2006).

² At the department's request, John and Patsy Paulin submitted a letter signed by both of them stating that they are both claimants.

Ms. Paulin to use the property for the use described in this report, to the extent that use was permitted at the time she acquired the property on August 6, 1976; and will not apply to Mr. Paulin only to the extent necessary to allow him to use the property for the use described in this report only to the extent the use was permitted when he acquired the property on November 10, 1986. The department acknowledges that the relief to which John Paulin is entitled under ORS 197.352 will not allow him to use the property in the manner set forth in the claim. (See the complete recommendation in Section VI. of this report.)

III. COMMENTS ON THE CLAIM

Comments Received

On May 31, 2005, 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, three written comments, evidence or information were received in response to the 10-day notice.³

One comment is relevant to whether the laws that are the basis for the claim are exempt under ORS 197.352(3). The comments have been considered by the department in preparing this report. (See comment letters 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 the Measure (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 the Measure (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 May 9, 2005, for processing under OAR 125, division 145. The claim identifies county partitioning standards as laws that restrict the use of the property as the basis for the claim. Only laws that were enacted prior to December 2, 2004, the effective date of Measure 37, are the basis for this claim. (See citations of statutory and administrative rule history of the Oregon Revised Statutes and Oregon Administrative Rules.)

³ The 10-day notice period was suspended for 139 days during the pendency of the *Macpherson v. Dep't of Admin. Servs.*, 340 Or ___, 2006 Ore. LEXIS 104 (February 21, 2006), which suspended all Measure 37 deadlines.

Conclusions

The claim has been submitted within two years of December 2, 2004; the effective date of Measure 37, based on land use regulations 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 claimant, Patsy Paulin, acquired the property on August 6, 1976, based on a Real Property Sale Contract included with the claim.⁴ The claimant, John Paulin, acquired an interest in the subject property on November 10, 1986, as reflected by a Deed included with the claim. The Hood River County Assessor’s Office confirmed that John and Patsy Paulin are current owners of the property.

Conclusions

The claimants, John and Patsy Paulin, are “owners” of the subject property, as that term is defined by ORS 197.352(11)(C). Patsy Paulin acquired an interest in the property on August 6, 1976. John Paulin acquired an interest in the property on November 10, 1986. Patsy Paulin is a family member to John Paulin, as that term is defined by ORS 197.352(11)(A).

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 states that the current law “denies partitioning and selling 2 ea. 2 ½-acre view lots.”

The claim is based on Hood River County’s Forest Zone (Forest-1) and the applicable provisions of state law that require such zoning. The claimants’ property is currently zoned Forest-1 as required by Goal 4, in accord with OAR 660 division 6 and ORS 215 because the claimants’

⁴ A Warranty Deed was also included with the claim, but the year the deed was executed was unreadable.

property is "forest land" as defined by Goal 4. Goal 4 became effective on January 25, 1975, and required that forest lands as defined by the Goal be zoned pursuant to ORS 215.

Current land use regulations, particularly ORS 215.780 and OAR 660, division 6, as applied by Goal 4, do not allow the subject property to be divided into parcels less than 80 acres. ORS 215.780 established an 80-acre minimum size for the creation of new lots or parcels in forest zones and became effective November 4, 1993 (Chapter 792, Oregon Laws 1993). OAR 660-006-0026, that implemented OAR 215.780, became effective March 1, 1994.

Patsy Paulin acquired the subject property on August 6, 1976, after the establishment of the statewide planning goals but prior to their implementing statutes and rules. The County's A-2 (Agriculture) zoning applied to the subject property in 1976. The Agriculture zone allowed for minor partitions as long as the parcel could support a septic system. Because the Commission had not acknowledged Hood River County's plan and land use regulations in 1976, including the A-2 zone, when Ms. Paulin acquired their property in 1976, Statewide Planning Goal 4 (Forest Lands) and other goals applied directly to the property.⁵ In general, Goal 4 required local land use regulations to "conserve forest land for forest uses." Specifically, Goal 4 only allowed land divisions that would protect commercial forest lands for commercial forest uses. Dwellings in forest zones can only be allowed if found to be "necessary and accessory" to one of the enumerated forest uses defined in Goal 4. Nothing in the claim demonstrates that Ms. Paulin's proposed division of the property into two, 2.5-acre parcels would be consistent with the provisions of Goal 4 in effect when she acquired the property in 1976.

Conclusions

The minimum lot size standards established in ORS 215 and OAR 660 division 6 applicable to land zoned forest were all enacted after Patsy Paulin acquired the subject property in August 1976, and do not allow the division of the property, thereby restricting the use of the property relative to the uses allowed when the property was acquired. In 1976, the property was subject to the requirements of the County's A-2 zone and the provisions of Goal 4. The claim does not establish whether or to what extent the requested division would have been allowed under the provisions of Goal 4 in effect in 1976.

This report addresses only those state laws that are identified in the claim, or that the department is certain apply to the property based on the uses that the claimants have identified. There may

⁵ Statewide Planning Goal 4 became effective on January 25, 1975, and was applicable to legislative land use decisions and some quasi-judicial land use decisions where site specific Goal provisions applied prior to the Commission's acknowledgment of the County's plan and implementing regulations. (*Sunnyside Neighborhood Assn. v. Clackamas County*, 280 Or 3 (1977), *1000 Friends of Oregon v. Benton County*, 32 Or App 413 (1978), *Jurgenson v. Union County*, 42 Or App 505 (1979), *Alexanderson v. Polk County*, 289 Or 427, rev den, 290 Or 137 (1980) and *Perkins v. City of Rajneeshpuram*, 300 Or 1 (1985)). After the County's plan and land use regulations were acknowledged by 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 in substance, the applicable rules must be interpreted and applied by the County in making its decision. *Forster v. Polk County*, 115 Or App 475 (1992) and *Kenagy v. Benton County*, 115 Or App 131 (1992).

be other laws that currently apply to the claimants' use of the 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 what 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.

3. Effect of Regulations on Fair Market Value

In order to establish a valid claim, ORS 197.352(1) 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 claim includes an estimate of \$400,000 as the reduction in the property's fair market value due to current regulations. This amount is based on the claimants' estimate of the market value of two 2.5-acre parcels. The claim includes a pending sale of real estate on a similar sized property (2.8 acres) to substantiate the estimate.

Conclusions

As explained in Section V.(1) of this report, the current owners are John and Patsy Paulin. Ms. Paulin acquired the property on August 6, 1976. Under ORS 197.352, John and Patsy Paulin are due compensation for land use regulations that restrict the use of the subject property in a manner that reduces its fair market value. Based on the findings and conclusions in Section V.(2) of this report, laws adopted since the Ms. Paulin acquired the property in 1976, restrict division of the subject property. The claimants estimate the reduction in value due to the restrictions to be \$400,000.

Without an appraisal or other documentation, and without verification of whether or to what extent the requested use of the property would have been permitted when Ms. Paulin acquired the property in 1976, it is not possible to substantiate the specific dollar amount the claimants demand for compensation. Nevertheless, based on the submitted information, the department determines that there may be some reduction in the fair market value of the subject property 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 land use regulations that restrict the use of the property relative to what would have been allowed in 1976, when the property was acquired by Patsy Paulin. These include applicable provisions of Statewide Planning Goal 4, ORS 215, and OAR 660, division 6,

which Hood River County has implemented through its Forest-1 zone. These laws are not exempt under ORS 197.352(3)(E) to the extent they were enacted or adopted after Ms. Paulin acquired the property in 1976. Provisions of Goal 4 and ORS 215 in effect when Ms. Paulin acquired the property are exempt under ORS 197.352(3)(E), which exempts laws in effect when the claimant or claimant's family acquired the property.

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..." To the extent they may be applicable under OAR 660-006-0050, the department finds that siting standards for dwellings in forest zones under ORS 215.730 and in Goal 4 and its implementing rules (OAR 660, division 6) are exempt under ORS 197.352(3)(B).

Conclusions

Without a specific development proposal for the property, it is not possible for the department to determine what laws 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 does appear that the general statutory, goal and rule restrictions on subdivision of forest land apply to the claimants' use of the property, and these laws are not exempt under ORS 197.352(3)(E) to the extent they were enacted or adopted after Ms. Paulin acquired the property in 1976. Provisions of Statewide Planning Goal 4 and ORS 215 in effect in 1976, when Patsy Paulin acquired the property are exempt under ORS 197.352(3)(E) and will continue to apply to the property.

Other laws in effect when Ms. Paulin acquired the property are also exempt under ORS 197.352(3)(E), and will continue to apply to the claimants' use of the property. In addition, the fire protection standards for forest dwellings in ORS 215.730 are exempt under ORS 197.352(3)(B) and will continue to apply to the property. There may be other laws that 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 what 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. And, 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 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 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 a law that restricts 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 current owner acquired the property. The Commission, by rule, has directed that if the department determines a claim is valid, the Director 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' ability to create the desired two, 2.5-acre lots out of the subject property. The claim asserts the laws enforced by the Commission or department reduce the fair market value of the subject property by \$400,000. However, because the claim does not provide an appraisal or other specific documentation for how the specified restrictions reduce the fair market value of the property, and without verification of whether or to what extent the requested use of the property would have been permitted when Ms. Paulin acquired the property in 1976, a specific amount of compensation cannot be determined. Nevertheless, based on the record for this claim, the department acknowledges that the laws on which the claim is based may have reduced the fair market value of the 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 Ms. Paulin to use the subject property for a use permitted at the time she acquired the property on August 6, 1976, and to allow Mr. Paulin to use the property for a use permitted at the time he acquired the property on November 10, 1986.

When John Paulin acquired an interest in the property in 1986, the property was subject to County's acknowledged forest zone, with a 40-acre minimum parcel size. Under the County's forest zoning in place in 1986, Mr. Paulin would not have been able to divide the property into the desired two 2.5-acre lots.

Conclusion

Based on the record, the department recommends that the claim be approved, subject to the following terms:

1. In lieu of compensation under ORS 197.352, the State of Oregon will not apply the following laws to the claimants' division of the 15-acre property into two, 2.5-acre parcels: applicable provisions of ORS 215 and OAR 660 division 6 enacted after the claimants acquired their respective interest in the property. These land use regulations will not apply to Ms. Paulin's use of her property only to the extent necessary to allow her to use the property as described in this report, and only to the extent that use was permitted at the time she acquired the property on August 6, 1976; and will not apply to Mr. Paulin's use of the property only to the extent

necessary to allow him to use the property for the use described in this report, to the extent permitted when he acquired the property on November 10, 1986. The department acknowledges that the relief to which Mr. Paulin is entitled under ORS 197.352 will not allow him to use the property in the manner set forth in the claim.

2. The action by the State of Oregon provides the state's authorization to Patsy Paulin, to use her property for the use described in this report, subject to the standards in effect on August 6, 1976. On that date, the property was subject to applicable provisions of ORS 215 and Statewide Planning Goal 4; and to John Paulin, to use the property for the use described in this report, subject to the standards in effect on November 10, 1986. On that date, the property was subject to Hood River County's forest zoning (40-acre minimum lot size).
3. To the extent that any law, order, deed, agreement or other legally enforceable public or private requirement provides that the 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 ORS 227.160, other permits or authorizations from local, state or federal agencies, and restrictions on the use of the property imposed by private parties.
4. Any use of the 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 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 property by the claimants.

VII. COMMENTS ON THE DRAFT STAFF REPORT

The department issued its draft staff report on this claim on October 14, 2005. 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. Comments received have been taken into account by the department in the issuance of this final report.