

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. M118409
(BALLOT MEASURE 37) OF)	
Glen Mills, CLAIMANT)	

Claimant: Glen Mills (the Claimant)

Property: Tax lot 1600, Township 3S, Range 2W, Section 9, Yamhill County (the Property)

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

Claimant 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:

1. In lieu of compensation under ORS 197.352, the State of Oregon will not apply the following laws to Glen Mills' division of his property into six parcels of not less than two acres, for residential development: Statewide Goal 14 (Urbanization) and OAR 660-004-0040. These land use regulations will not apply to Mr. Mills' use of the subject property only to the extent necessary to allow him to use the property for the use described in this report, as permitted at the time he acquired the property.
2. The action by the State of Oregon provides the state's authorization to the claimant to use his property for the use described in this report, subject to the standards in effect on June 5, 1952.
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

claimant first obtains 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 claimant 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 claimant to use the property, it may be necessary for him 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 claimant 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 claimant.

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 20th day of March, 2006.

FOR the DEPARTMENT OF ADMINISTRATIVE
SERVICES:



Dugan Petty, Deputy Administrator
DAS, State Services Division

Dated this 20th 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 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 20, 2006

STATE CLAIM NUMBER: M118409

NAME OF CLAIMANT: Glen Mills

MAILING ADDRESS: 15125 Northeast Springbrook Road
Newberg, Oregon 97132

IDENTIFICATION OF PROPERTY: Township 3S, Range 2W, Section 9
Tax lot 1600
Yamhill County

DATE RECEIVED BY DAS: May 10, 2005

180-DAY DEADLINE: March 25, 2006¹

I. CLAIM

The claimant, Glen Mills, seeks compensation in the amount of \$990,000 for a reduction in fair market value of his subject property as a result of certain land use regulations that are alleged to restrict the use of certain private real property. The claimant desires compensation or the right to divide his 13.48-acre property into parcels of not less than two acres for residential development. The subject property is located at 15125 Northeast Springbrook Road, near the City of Newberg, in Yamhill 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, in lieu of compensation, that the requirements of the following laws enforced by the Land Conservation and Development Commission (the Commission) or the department not apply to the claimant to allow him to divide the property into six parcels of not less than two acres for residential development: the applicable provisions of Statewide Planning Goal 14 (Urbanization) and OAR 660-004-0040. These laws will not apply to Mr. Mills' use of the property only to the extent necessary to allow Mr. Mills to use the subject property for the use described in this report, as permitted at the time he acquired it on June 5, 1952. (See the complete recommendation in Section VI. of this report.)

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).

III. COMMENTS RECEIVED

On June 2, 2005, pursuant to OAR 125-145-0080, the Oregon Department of Administrative Services (DAS) provided written notice to owners of surrounding properties. According to DAS, no written comments were received in response to the 10-day notice.²

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

The claim was submitted to DAS on May 10, 2005 for processing under OAR 125, division 145. The claim identifies Yamhill County's Agriculture/ Forestry Small Holding zoning (AF-10) that restricts 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.)

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.

² 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.

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, Glen Mills, acquired the subject property by Bargain and Sale Deed on June 5, 1952. (See claim.) On February 12, 1994, the claimant transferred the property to the Mills Living Trust, a revocable living trust, with himself as a trustee. The Mills Living Trust is the current owner of the property, as documented by a May 3, 2005, property profile from Northwest Title Company. (See claim.) Transfer of the property to a revocable trust does not result in a change in ownership for purposes of ORS 197.352. (See additional material furnished by the claimant.)

Conclusions

The claimant, Glen Mills, is an “owner” of the subject property as that term is defined in ORS 197.352(11)(C), as of June 5, 1952.

2. The Laws that are the Basis for the Claim

In order to establish a valid claim, ORS 197.352(1) requires, in part, that a law must restrict the claimant’s 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 claimant or a family member acquired the property.

Findings of Fact

The claimant lists the county’s AF-10 zone as the land use regulation restricting the use of the property.³

The property is currently zoned AF-10, which is a rural residential designation under the Yamhill County Comprehensive Plan, in accord with Statewide Planning Goal 14 (Urbanization). The AF-10 zone requires a minimum of ten acres for the creation of new lots or parcels. The subject property is 13.48 acres and cannot be divided under the AF-10 zone.

Goal 14 became effective on January 25, 1975, and required local comprehensive plans to provide for an orderly and efficient transition from rural to urban land use. The courts have found that Goal 14, generally, prohibits residential development at urban densities on rural lands. Rural lands are lands outside of an urban growth boundary (UGB). As interpreted by the courts

³ The claimant, Glen Mills, in an April 18, 2005, letter to the Yamhill County Planning Department, requested permission to partition the subject property into 2-acre building lots. The County denied this request based on the property’s AF-10 zoning, which established a 10-acre minimum lot size for the property.

and the Commission, Goal 14, generally, prohibits residential development outside of an urban growth boundary where lot or parcel sizes are less than 2 acres. (See, e.g. *1000 Friends of Oregon v. LCDC (Curry County)*, 301 Or 447 (1986); *DLCD v. Klamath County*, 38 Or LUBA 769 (2000).) As a result of the 1986 *Curry County* Oregon Supreme Court decision, the Commission amended Statewide Planning Goal 14 (Urbanization) and adopted OAR 660-004-0040, establishing rules for rural residential development outside urban growth boundaries, which became effective on October 4, 2000. The rule provides that if, on October 4, 2000, a rural residential zone 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 which 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 subject parcel does not have more than one habitable dwelling. Thus, the rule does not allow the subject property to be divided into less than the 10-acre lots allowed by the current Yamhill County AF-10 zone.⁴

The claimant acquired the property in 1952, prior to the adoption of the Statewide Planning Goals or their implementing statutes and regulations. Yamhill County had not zoned this property when the claimant acquired it in 1952.

Conclusions

Statewide Planning Goal 14 and OAR 660-004-0040 were adopted after the claimant became the owner of the subject property and restrict the minimum lot size of the subject property. Land use laws adopted since June 5, 1952, restrict the use of the property relative to the uses allowed when he acquired the property June 5, 1952.

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 claimant has identified. There may be other laws that currently apply to the claimant's use of the property, and that may continue to apply to the claimant's 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 claimant seeks a building permit 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 laws 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 \$990,000 as the reduction in the property's fair market value, due to current regulations. This amount is based on the claimant's estimate of the market value

⁴ According to the Yamhill County Measure 37 staff report dated July 22, 2005, on February 11, 1976 (Ordinance 83), the subject property was zoned AF-10, with a 10-acre minimum lot size, and the present zoning on the property remains AF-10.

of two-acre lots in the area. The claimant estimates the current value of the 13.48-acre property at \$450,000 and the value of the property divided into six two-acre buildable lots at \$1,440,000. The claimant identifies \$990,000 (the difference between those two figures, as the loss in fair market value as the result of current regulations.⁵

Conclusions

As explained in Section V.(1) of this report, Glen Mills is the current owner, as of June 5, 1952. Under ORS 197.352, Mr. Mills is due compensation for land use laws 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 claimant acquired the property restrict division of the subject property.

The claim asserts the reduction in value due to the restrictions to be \$990,000. However, without an appraisal or other documentation, it is not possible to substantiate the specific dollar amount the claimant demands for compensation. Nevertheless, based on the submitted information, the department determines that it is more likely than not that there has been 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 provisions of state law that restrict the use of the property and reduce its fair market value. These are Statewide Planning Goal 14 (Urbanization) and OAR 660-004-0040. These state laws were adopted after the claimant acquired the property in 1952. Therefore, none of the laws identified in the claim are exempt, under ORS 197.352(3)(E), which exempts laws in effect when the claimant acquired the property.

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 rural residential development apply to the claimant's use of the property, and these laws are not exempt under ORS 197.352(3)(E).

Laws in effect when the claimant acquired the property are exempt under ORS 197.352(3)(E) and will continue to apply to the claimant's use of the property. There may be other laws that continue to apply to the claimant's use of the property that have not been identified in the claim.

⁵ The county Measure 37 claim decision includes the affidavit of David Lawson, Yamhill County Assessor, which states the reduction in value submitted with the Mills claim is reasonable.

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 claimant seeks 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 claimant has 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 claimant should be aware that the less information he has provided to the department in his claim, the greater the possibility that there may be additional laws that will later be determined to continue to apply to his 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 enacted or 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 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 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 prohibit the division of the subject property into six lots of not less than two-acres for residential development. These restrictions reduce the fair market value of the subject property to some extent. The claim asserts this amount to be \$990,000. 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, a specific amount of compensation cannot be determined. Nevertheless, the department acknowledges that state land use laws likely 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 Mr. Mills to use the subject property for a use permitted at the time he acquired the property on June 5, 1952.

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 Glen Mills' division of his property into six parcels of not less than two acres, for residential development: Statewide Goal 14 (Urbanization) and OAR 660-004-0040. These land use regulations will not apply to Mr. Mills' use of the subject property only to the extent

necessary to allow him to use the property for the use described in this report, as permitted at the time he acquired the property.

2. The action by the State of Oregon provides the state's authorization to the claimant to use his property for the use described in this report, subject to the standards in effect on June 5, 1952.

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 claimant first obtains 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 claimant 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 claimant to use the property, it may be necessary for him 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 claimant 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 claimant.

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.