

BEFORE THE DEPARTMENT OF ADMINISTRATIVE SERVICES,
THE DEPARTMENT OF LAND CONSERVATION AND DEVELOPMENT OF
THE STATE OF OREGON

IN THE MATTER OF THE CLAIM FOR)
COMPENSATION UNDER ORS 197.352)
(BALLOT MEASURE 37) OF)
Albert and Demetra Caudell, CLAIMANTS)

FINAL ORDER
CLAIM NO. MI18416

Claimants: Albert and Demetra Caudell (the Claimants)

Property: TL 100,T 1S, R 5E, S 8, 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 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 Albert and Demetra Caudell's division of the 84.77-acre property into two parcels and development of one residential dwelling on each parcel: applicable provisions of Statewide Planning Goal 4, ORS 215 and OAR 660 division 6 enacted after May 5, 1988. These land use regulations will not apply to Mr. and Ms. Caudell's use of their property for the use described in this report, and only to the extent necessary to allow the claimants a use permitted at the time they acquired the property on May 5, 1988.
2. The action by the State of Oregon provides the state's authorization to the claimants to use their property for the use described in this report subject to the standards in effect on May 5, 1988. On that date, the property was subject to Clackamas County's acknowledged General Timber District (GTD-40) then in effect. The claimants will also continue to be subject to ORS 215.730 and those provisions of Goal 4 and its implementing rules in OAR 660 division 6 related

to siting standards for dwellings for the protection of public health and safety and to any other laws that are exempt under ORS 197.352(3)(B).

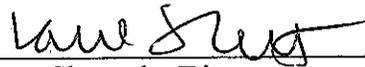
3. To the extent that any law, order, deed, agreement or other legally enforceable public or private requirement provides that the property may not be used without a permit, license, or other form of authorization or consent, the order will not authorize the use of the property unless the claimants first 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 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: M118416

NAMES OF CLAIMANTS: Albert and Demetra Caudell

MAILING ADDRESS: PO Box 190
Sandy, Oregon 97055

PROPERTY IDENTIFICATION: Township 1S, Range 5E, Section 8
Tax lot 100
43255 SE Herrick Road
Clackamas County

OTHER INTEREST IN PROPERTY: Albert B. Caudell and
Demetra E. Caudell Revocable Living Trust

DATE RECEIVED BY DAS: May 11, 2005

180-DAY DEADLINE: March 26, 2006¹

I. SUMMARY OF CLAIM

The claimants, Albert and Demetra Caudell, seek compensation in the amount of \$1,015,876 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 the 84.77-acre property into two approximately 40-acre parcels and develop each with a dwelling.² The property is located at 43255 SE Herrick Road, in Clackamas County. (See claim.)

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 The claimants recently modified their claim after they obtained approval from Clackamas County to divide the 89.77-acre property that was the basis for this claim into a five-acre parcel (containing an existing home) and an 84.77-acre parcel. Claimants now seek to divide the 84.77-acre parcel into two parcels and develop a residential dwelling on each of those parcels.

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 Albert and Demetra Caudell's division and development of the 84.77-acre property: applicable provisions of Statewide Planning Goal 4 (Forest Lands), ORS 215 and OAR 660 division 6 enacted after May 5, 1988. These laws will not apply to the claimants only to the extent necessary to allow them to use of the property for the use described in this report, and only to the extent that use was permitted at the time they acquired the property on May 5, 1988. (See the complete recommendation in Section VI. of this report.)

III. COMMENTS ON THE CLAIM

Comments Received

On June 7, 2005, pursuant to OAR 125-145-0080, the Oregon Department of Administrative Services (DAS) provided written notice to the owners of surrounding properties. In response to the 10-day notice,³ DAS received one comment letter that is relevant to whether a state law restricts the claimants' use of the property and whether the restriction of the claimants' use of the property reduces the fair market value of the property. The comment has been considered by the department in preparing this report. (See the comment letter in the department's claim file.)

IV. TIMELINESS OF CLAIM

Requirement

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

1. For claims arising from land use regulations enacted prior to the effective date of 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 11, 2005, for processing under OAR 125 division 145. The claim identifies Clackamas County's Timber District (TBR) and state laws that restrict the

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.

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.

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, Albert and Demetra Caudell, acquired the subject property through a Memorandum of Contract of Sale on May 5, 1988 (See Memorandum of Contract of Sale and Fulfillment Deed dated April 9, 1992, in the department’s claim file).

On July 5, 1995, the claimants created the Albert B. Caudell and Demetra E. Caudell Revocable Living Trust and transferred the subject property to the Trust on that date (Clackamas County Deed Records 95-039054). The claimants are the Trustor and Trustee of the Trust. This transfer of the property into a revocable trust does not constitute a change in ownership for purposes of ORS 197.352.

The most recent Clackamas County Property Account Summary indicates that the claimants are the current owners of the subject property.

Conclusions

The claimants, Albert and Demetra Caudell, are “owners” of the subject property, as that term is defined by ORS 197.352(11)(C). The claimants acquired their interest in the subject property on May 5, 1988.

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 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 claim states that “[w]e purchased our property in 1988. Zoning at the time was GTD 40. In 1993, zoning changed to TBR 80. This zoning change prevented us from partitioning in two 40-acre parcels.”

The cited Clackamas County Timber District (TBR) implements Statewide Planning Goal 4 (Forest Lands) and statutes applicable to land zoned for forest use under ORS 215, including ORS 215.705 to 215.755 and 215.780, and provisions of OAR 660 division 6 that restrict the property’s use and division. Goal 4 became effective on January 25, 1975, and required forest land as defined by the Goal to be zoned for forest use.⁴ (See citations to statutory and rule history under OAR 660-015-0000(4).) The forest land administrative rules, OAR 660 division 6 became effective September 1, 1982. ORS 215.705 to 215.755 and 215.780 became effective on November 4, 1993, (Chapter 792, Or Laws 1993) and were implemented by OAR 660-006-0026 and 0027 on March 1, 1994. (See citations to rule history under OAR 660-006-0026 and 0027.) ORS 215.730(1)(b) establishes approval standards for dwellings on lands zoned for forest use to protect the public health and safety with regard to fire safety, water supply and development on steep slopes.

Together, ORS 215.705 to 215.755 and 215.780 and OAR 660-006-0026 and 0027 establish an 80-acre minimum lot size for the creation of a new parcel in a forest zone and also establish the standards for dwellings in forest zones.

When the claimants acquired the property in 1988, it was zoned GTD-40 (General Timber District, 40-acre minimum lot size) which may have allowed claimants to create two parcels of at least 40 acres and to develop a residential dwelling on each of the new parcels.⁵

Conclusions

Current minimum lot size and dwelling standards established by ORS 215.705 to 215.755 and 215.780, Statewide Planning Goal 4 and OAR 660-006-0026 and 0027 and the Clackamas County TBR Timber District were adopted after the claimants acquired the property in 1988, and

⁴ The subject property is composed primarily of Alspaugh clay loam (2C and 2E) and Bull Run silt loam (9B, 9D and 9E) (NRCS Capability Class III, IV and VI) with a site index for Douglas-fir of 150 and 165 (Soil Survey of Clackamas County, Oregon, pp. 18-19, and 25-27 and map sheets #5 and #10, published in 1982, based on field work completed in 1981).

⁵ The General Timber District (GTD) was found to be in compliance with Statewide Planning Goal 4 by the Commission in 1981 (see LCDC Continuance Order dated December 31, 1981, pp. 26-28). The GTD zone was amended on September 7, 1987, to address changes in state law (Clackamas County Order 87-1086). The test for establishing a dwelling in the GTD Zone at the time when the claimant acquired the property in 1988 was to demonstrate the need for the dwelling by finding that the dwelling is necessary for the management of the land for the principle uses (s) proposed by the applicant (Section 405.04(3)). A dwelling that may “enhance” forest uses is not “necessary and accessory” to a forest use to the extent required by Goal 4 and the County’s acknowledged GTD zone that applied to the claimants’ property in 1988 (*1000 Friends of Oregon v. LCDC/Lane County*, 305 Or 384, 392-393 (1988)).

do not allow the division of the properties into parcels less than 80 acres in size or the development of dwellings on such parcels. In 1988, the property was subject to the County's acknowledged GTD-40 zone, which may have allowed the creation of 40-acre parcels and the development of a residential dwelling on such parcels.

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 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 \$1,015,876 as the reduction in the property's fair market value due to current regulations. This estimate is based on the claimants being able to divide the property into two approximately 40-acre parcels, and a comparison of the market value of two other properties of similar size resulting in a market value of \$1,325,000. This amount less the cost of the property under current regulations of \$309,124 results in a reduction in the property's fair market value of \$1,015,876.

Conclusions

As explained in Section V.(1) of this report, the current owners are Albert and Demetra Caudell who acquired the property on May 5, 1988. Under ORS 197.352, Mr. and Ms. Caudell 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 claimants acquired the property restrict the division and development of the subject property. The claimants estimate the reduction in value due to the restrictions to be \$1,015,876.

Without an appraisal or other documentation, 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 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 includes a reference to state statutes and administrative rules that restrict the use of the property relative to what would have been allowed in 1988, when the property was acquired by the claimants. These provisions include Statewide Planning Goal 4 (Forest Lands) and applicable provisions of ORS 215 and OAR 660 division 6 which Clackamas County has implemented through its acknowledged TBR District. Provisions of Goal 4, ORS 215 and OAR 660 division 6 in effect prior to 1988, are exempt under ORS 197.352(3)(E), which exempts laws in effect at the time the claimant acquired the property, and will continue to apply to the property.

The department notes that ORS 215.730 and OAR 660 division 6 include standards for the siting of dwellings in forest zones. This provision includes fire protection standards for dwelling and 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....” Siting standards for dwellings in forest zones in 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 residential development and use of forest lands apply to the claimants’ use of the property, and for the most part these laws are not exempt under ORS 197.352(3)(E). However, provisions of Goal 4, ORS 215 and OAR 660, division 6, in effect prior to 1988 are exempt under ORS 197.352(3)(E).

Other laws in effect when the claimants acquired the property are also exempt under ORS 197.352(3)(E) and will continue to apply to the claimants’ use of the property. The restrictions in ORS 215.730 and provisions of OAR 660, division 6, that establish fire protection standards for dwellings in forest zones are also exempt under ORS 197.352(3)(B) and will continue to apply to the subject 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). For example, siting standards in forest zones designed to protect public health and safety are exempt under ORS 197.352(3)(B).

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 approximately 40-acre parcels, or develop one residential dwelling on each of those parcels. The claim asserts that the laws enforced by the Commission or department reduce the fair market value of the subject property by \$1,015,876. 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, based on the record for this claim, the department acknowledges that the laws on which the claim is based 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. and Ms. Caudell to use the subject property for a use permitted at the time they acquired the property on May 5, 1988.

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 Albert and Demetra Caudell's division of the 84.77-acre property into two parcels and development of one residential dwelling on each parcel: applicable provisions of Statewide Planning Goal 4, ORS 215 and OAR 660 division 6 enacted after May 5, 1988. These land use regulations will not apply to Mr. and Ms. Caudell's use of their property for the use described in

this report, and only to the extent necessary to allow the claimants a use permitted at the time they acquired the property on May 5, 1988.

2. The action by the State of Oregon provides the state's authorization to the claimants to use their property for the use described in this report subject to the standards in effect on May 5, 1988. On that date, the property was subject to Clackamas County's acknowledged General Timber District (GTD-40) then in effect. The claimants will also continue to be subject to ORS 215.730 and those provisions of Goal 4 and its implementing rules in OAR 660 division 6 related to siting standards for dwellings for the protection of public health and safety and to any other laws that are exempt under ORS 197.352(3)(B).

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 17, 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.