

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. M118417
(BALLOT MEASURE 37) OF)	
Robert Cox, CLAIMANT)	

Claimant: Robert Cox (the Claimant)

Property: TL 501, T 11S, R 2W, S 19, Linn 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 Robert Cox's establishment of a single family dwelling on his 42.5-acre property: applicable provisions of Statewide Planning Goal 3, ORS 215 and OAR 660 division 33 enacted after September 21, 1980. These land use regulations will not apply to Mr. Cox's use of his property only to the extent necessary to allow him to use the property for the use described in this report, to the extent that use was permitted at the time he acquired the property on September 21, 1980.
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 September 21, 1980. On that date, the property was subject to direct application of Statewide Planning Goal 3 and applicable provisions of ORS 215 then in effect.

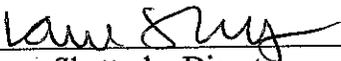
3. To the extent that any law, order, deed, agreement or other legally enforceable public or private requirement provides that the property may not be used without a permit, license, or other form of authorization or consent, the order will not authorize the use of the property unless the claimant first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

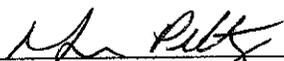
FOR DLCD AND THE LAND CONSERVATION
AND DEVELOPMENT COMMISSION:



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: M118417
NAME OF CLAIMANT: Robert Cox
MAILING ADDRESS: 33554 Spicer Road
Lebanon, OR 97355
PROPERTY IDENTIFICATION: Township 11S, Range 2W, Section 19
Tax lot 501
Linn County
DATE RECEIVED BY DAS: May 11, 2005
180-DAY DEADLINE: March 26, 2006¹

I. SUMMARY OF CLAIM

The claimant, Robert Cox, seeks compensation in the amount of \$50,000 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 claimant desires compensation or the right to develop a dwelling on the 42.5-acre property. The property does not have a street address and is located at the location coordinates listed above, in Linn County. (See claim.)

II. SUMMARY OF STAFF RECOMMENDATION

Based on the findings and conclusions set forth below, the Department of Land Conservation and Development (the department) has determined that the claim is 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 Robert Cox's establishment of a dwelling on his 42.5-acre property: applicable provisions of Statewide Planning Goal 3, ORS 215 and OAR 660 division 33 enacted after September 21, 1980. These laws will not apply to the claimant only to the extent necessary to allow Robert Cox to use the property for the use described in this report, to the extent that use was permitted at the time he acquired the property in 1980. (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 ON THE CLAIM

Comments Received

On June 6, 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, one written comment, evidence or information was received in response to the 10-day notice.²

The comment does not address whether the claim meets the criteria for relief (compensation or waiver) under ORS 197.352. Comments concerning the effects a use of the property may have on surrounding areas generally are not something that the department is able to consider in determining whether to waive a state law. If funds do become available to pay compensation, then such effects may become relevant in determining which claims to pay compensation for instead of waiving a state law. (See 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 Goal 3, ORS 215 and OAR 660 division 33 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.)

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.

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, Robert Cox, acquired the subject property on September 21, 1980, as reflected by a Warranty Deed included with the claim. Current ownership of the subject property by Mr. Cox was confirmed by the Linn County Assessor’s Office.

Conclusions

The claimant, Robert Cox, is an “owner” of the subject property, as that term is defined by ORS 197.352(11)(C), as of September 21, 1980.

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 requests “modification or nonapplication of all land use regulations that restrict establishment of one single family dwelling and accessory uses of the property.” Additional information submitted by the claimant’s representative indicates that the claimant could have built a farm dwelling on the property at the time of acquisition, and received a permit to do so in 1990 (but did not build at that time). The claimant is currently unable to build because of laws related to passage of HB 3661 in 1993.

The claim is based, generally, on Linn County’s current Exclusive Farm Use (EFU) zone and the applicable provisions of state law that require such zoning. The claimant’s property is zoned EFU as required by Goal 3, in accord with OAR 660 division 33 and ORS 215 because the

claimant's property is "agricultural land" as defined by Goal 3.³ Goal 3 became effective on January 25, 1975, and required that agricultural lands as defined by the Goal be zoned EFU pursuant to ORS 215.

Current land use regulations, particularly ORS 215.263, 215.284, 215.780 and OAR 660 division 33 as applied by Goal 3 do not allow the subject property to be divided into parcels less than 80 acres and establish standards for allowing the existing or any proposed parcels to have farm or non-farm dwellings on them.

ORS 215.780 established an 80-acre minimum size for the creation of new lots or parcels in EFU zones and became effective November 4, 1993 (Chapter 792, Oregon Laws 1993). ORS 215.263 (2003 edition) establishes standards for the creation of new parcels for non-farm uses and dwellings allowed in an EFU zone.

OAR 660-033-0135 (applicable to farm dwellings) became effective on March 1, 1994, and interprets the statutory standard for a primary dwelling in an EFU zone under ORS 215.283(1)(f).

OAR 660-033-0130(4) (applicable to non-farm dwellings) became effective on August 7, 1993, and was amended to comply with ORS 215.284(4) on March 1, 1994. Subsequent amendments to comply with HB 3326 (Chapter 704, Oregon Laws 2001, and effective January 1, 2002,) were adopted by the Commission effective May 22, 2002. (See citations of administrative rule history for OAR 660-033-0100, 0130 and 0135.)

Mr. Cox acquired the property on September 21, 1980, when it was zoned EFU, a qualified EFU zone under ORS 215 by Linn County. The County's EFU zone at that time required a 40-acre minimum parcel size for the creation of new lots or parcels; farm and non-farm dwellings were allowed pursuant to ORS 215. However, the County's EFU zone that applied to the property at that time was not acknowledged by the Commission under the standards for state approval of local comprehensive plans and land use regulations pursuant to ORS 197.250 and 197.251.⁴ Since the Commission had not acknowledged Linn County's comprehensive plan and land use regulations, including the EFU zone, when Robert Cox acquired the property on September 21, 1980, Statewide Planning Goal 3 applied directly to property on the date of his acquisition.⁵

³ The claimant's property is "agricultural land" because it consists of primarily Class II and III soils. (See the department's claim file.)

⁴ The Commission acknowledged the Linn County Comprehensive Plan and land use regulations as complying with the Statewide Planning Goals on December 13, 1990.

⁵ Statewide Planning Goal 3 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 Goal 3 program on February 9, 1979 (*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).

For dwellings allowed under EFU zoning as required by Goal 3 on the date of acquisition in 1980, farm dwellings were allowed if determined to be “customarily provided in conjunction with farm use” under ORS 215.213(1)(e) (1975 edition). ORS 215.213(3) (1975 edition) authorized a non-farm dwelling only where the dwelling was compatible with farm uses, consistent with the intent of ORS 215.243, did not interfere seriously with accepted farming practices on adjacent lands, did not materially alter the stability of the land use pattern for the area, and was situated on land that is generally unsuitable for production of farm crops and livestock. ORS 215.213(3) (1975 edition).⁶ Before a farm dwelling could be established on agricultural land, the farm use to which the dwelling related must “be existing.”⁷ Further, approval of a farm dwelling required that the dwelling be situated on a parcel wholly devoted to farm use.

No information has been provided concerning whether a dwelling, as desired by the claimant, would comply with the approval standards for dwellings in effect at the time Robert Cox acquired the property in 1980.

Conclusions

Lot size and dwelling standards established by amendments to Statewide Planning Goal 3, ORS 215, and OAR 660 division 33 adopted since the claimant acquired the property in 1980, do not allow the approval of a dwelling on the subject property as may have been possible in 1980.

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 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.”

⁶ When determining whether land is “generally unsuitable for the production of farm crops and livestock” under ORS 215.213(3) or 215.283(3), the entire parcel or tract must be evaluated rather than a portion thereof. *Smith v. Clackamas County*, 313 Or 519 (1992).

⁷ *Matteo v. Polk County*, 11 Or LUBA 259, 263 (1984) *affirmed without opinion*, 70 Or App 179 (September 14, 1984) and *Newcomer v. Clackamas County*, 92 Or App 174, *modified* 94 Or App 33, (November 23, 1988).

Findings of Fact

The claim includes an estimate of "not less than \$50,000" as the property's estimated reduction in fair market value due to current regulations. This estimate is based on a real estate broker's price opinion of a dwelling on a one- or two-acre lot in the area.

Conclusions

As explained in Section V.(1) of this report, the current owner is Robert Cox who acquired the property on September 21, 1980. Under ORS 197.352, Mr. Cox is 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 claimant's family acquired the property restrict the establishment of a dwelling on the subject property. The claimant estimates the reduction in value due to the restrictions to be \$50,000.

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 state land use regulations that restrict the use of the property relative to what would have been allowed in 1980, when the property was acquired by Robert Cox. These provisions include applicable provisions of ORS 215 and OAR 660 division 33, which Linn County has implemented through its EFU zone. These laws are not exempt under ORS 197.352(3)(E), to the extent they were enacted or adopted after the claimant acquired the property in 1980. Provisions of Statewide Planning Goal 3, ORS 215, and OAR 660 enacted or adopted before September 21, 1980, are exempt under ORS 197.352(3)(E), which exempts laws in effect when the claimant acquired the property.

Conclusions

It does appear that the general statutory, goal and rule restrictions on residential development and use of farm land apply to the claimant's 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 the claimant acquired the property. Applicable provisions of Statewide Planning Goal 3, ORS 215 and OAR 660 in effect when the claimant acquired the property in 1980, are exempt under ORS 197.352(3)(E) and will continue to apply to the property.

Other laws in effect when the claimant acquired the property are also 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. 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 the 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 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 claimant's ability to develop a dwelling on the subject property. The claim asserts that the laws enforced by the Commission or department reduce the fair market value of the subject property by \$50,000. However, because the claim does not provide an appraisal or other specific documentation to establish 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 Robert Cox to use the subject property for a use permitted at the time he acquired the property on September 21, 1980.

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 Robert Cox's establishment of a single family dwelling on his 42.5-acre property: applicable provisions of Statewide Planning Goal 3, ORS 215 and OAR 660 division 33 enacted after September 21, 1980. These land use regulations will not apply to Mr. Cox's use of his property only to the extent necessary to allow him to use the property for the use described in this report, to the extent that use was permitted at the time he acquired the property on September 21, 1980.
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 September 21, 1980. On that date, the property was subject to direct application of Statewide Planning Goal 3 and applicable provisions of ORS 215 then in effect.
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.