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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.

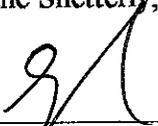
4. Any use of the property by the claimants under the terms of the order will remain subject to the following laws: (a) those laws not specified in (1) above; (b) any laws enacted or enforced by a public entity other than the Commission or the department; and (c) those laws not subject to ORS 197.352 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 Deputy 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



George Naughton, Deputy Director
DLCD

Dated this 24th day of March, 2006.

FOR the DEPARTMENT OF ADMINISTRATIVE
SERVICES:



Dugan Petty, Deputy Administrator
DAS, State Services Division

Dated this 24th 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 183.484: Judicial review under ORS 183.484 may be obtained by filing a petition for review within 60 days from the service of this order. A petition for judicial review under ORS 183.484 may be filed in the Circuit Court for Marion County or the Circuit Court in the county in which you reside.
2. A cause of action under ORS 197.352 (Measure 37 (2004)): If a land use regulation continues to apply to the subject property more than 180 days after the present owner of the property has made written demand for compensation under ORS 197.352¹, the present owner of the property, or any interest therein, shall have a cause of action in the circuit court in which the real property is located.

(Copies of the documents that comprise the record are available for review at the Department's office at 635 Capitol Street NE, Suite 150, Salem, Oregon 97301-2540)

FOR INFORMATION ONLY

The Oregon Department of Justice has advised the Department of Land Conservation and Development that "[i]f the current owner of the real property conveys the property before the new use allowed by the public entity is established, then the entitlement to relief will be lost."

¹ By order of the Marion County Circuit Court, "all time lines under Measure 37 [were] suspended indefinitely" on October 25, 2005. This suspension was lifted on March 13, 2006 by the court. As a result, a period of 139 days (the number of days the time lines were suspended) has been added to the 180-day time period under ORS 197.352(6) for claims that were pending with the state on October 25, 2005.

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

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

March 24, 2006

STATE CLAIM NUMBER: M118432

NAMES OF CLAIMANTS: John and Vicki Oberg

MAILING ADDRESS: 30503 Southwest Firdale Road
Cornelius, Oregon 97113

IDENTIFICATION OF PROPERTY: Township 1S, Range 3W, Section 36
Tax Lot 103
Washington County

OTHER INTEREST IN PROPERTY: Oberg Family Revocable Living Trust

DATE RECEIVED BY DAS: May 16, 2005

180-DAY DEADLINE: March 31, 2006¹

I. CLAIM

The claimants, John and Vicki Oberg, seek compensation in the amount of "\$300,000 an acre" 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 7.09-acre property into two or three parcels and to develop each parcel with a dwelling. The property is located at 30503 Southwest Firdale Road, Cornelius, in Washington 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 their 7.09-acre property into two or three parcels or to their development of a dwelling on each parcel: applicable provisions of Statewide Planning Goal 3

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).

(Agricultural Lands), ORS 215 and OAR 660, division 33. These laws will not apply to the claimants to the extent necessary to allow them to use the subject property for the use described in this report, to the extent that use was permitted at the time they acquired the property on February 9, 1973. (See the complete recommendation in Section VI. of this report.)

III. COMMENTS ON THE CLAIM

Comments Received

On June 8, 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 was received in response to the 10-day notice.²

This 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 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 16, 2005, for processing under OAR 125, division 145. The claim identifies "HB 3241, 42, 43, 44, 45, 46, 47, 48, 49, and HB 2643" as the laws that limit the use of the claimants' property. The claim does not establish when those laws were enacted or by what jurisdiction.

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, from the claim materials submitted to the state, it cannot be determined if the claim is based on land use regulations adopted prior to December 2, 2004.

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, John and Vicki Oberg, acquired the subject property on February 9, 1973 (see Warranty Deed attached to the claim). Based on a 2004-2005 Real Property Tax Statement attached to the claim, it appears that the property was transferred to the Oberg Revocable Living Trust, a trust established by the claimants.³ Transfer of the property to a revocable trust does not result in a change in ownership for purposes of ORS 197.352.

Conclusions

The claimants, John and Vicki Oberg, are “owners” of the subject property as that term is defined by ORS 197.352(11)(C), as of February 9, 1973.

2. The Laws that Are the Basis for the Claim

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 Fact

The claim states: “HB 3241, 42, 43, 44, 45, 46, 47, 48, 49, and HB2643” as restricting the claimants from dividing their property into parcels and building homes on them. The claim does not establish the restrictions to which these references refer, or how any of these referenced restrictions restrict the use of the claimant’s property. However, to the extent the claimants desire to divide their property into two or three parcels for residential development, the department concludes that the claim is based on laws that restrict the claimants from that desired objective.

³ The claim does not include information to document when the property was transferred to the Oberg Family Revocable Living Trust.

The claim is presumably based on Washington County's current Exclusive Farm Use (EFU) zone and the applicable provisions of state law that require such zoning. The claimants' property is zoned EFU as required by Statewide Planning Goal 3 (Agricultural Lands), in accord with ORS 215 and OAR 660, division 33, because the claimants' property is "agricultural land" as defined by Goal 3. Goal 3 became effective on January 25, 1975, and required that agricultural lands as defined by the Goal are zoned EFU pursuant to ORS 215.

Current land use regulations, particularly Goal 3 and ORS 215.213, 215.263, 215.780 and AR 660, division 33 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 215.213.

OAR 660-033-0130(4)(e) (applicable to non-farm dwellings in marginal lands counties) became effective on August 7, 1993.

The claimants acquired the subject property on February 9, 1973, prior to the establishment of the Statewide Planning Goals and their implementing statutes and regulations. Depending on the local zoning of the property in 1973, provisions of ORS 215, enacted in 1963, may have applied to the property when the claimants acquired it.

Conclusions

The zoning requirements, minimum lot size and dwelling standards established by Statewide Planning Goal 3 (Agricultural Lands) and provisions applicable to land zoned EFU in ORS 215 and OAR 660, division 33, were all enacted after John and Vicki Oberg acquired the subject property on February 9, 1973, 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 by the claimants in 1973.

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 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 law(s) described in Section V.(2) of this report must have “the effect of reducing the fair market value of the property, or any interest therein.”

Findings of Fact

The claim estimates the reduction in fair market value due to current land use restrictions as “\$300,000 per acre.” The \$300,000 per acre amount is not substantiated.

Conclusions

As explained in Section V.(1) of this report, John and Vicki Oberg are the current owners who acquired the property on February 9, 1973. Thus, under ORS 197.352, the claimants 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 1973, restrict the claimants’ ability to divide and develop the property. The claimants estimate the reduction in value due to the restrictions to be \$300,000 per acre.

Without an appraisal or other explanation, 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 laws. In addition, under ORS 197.352(3), certain types of laws are exempt from ORS 197.352.

Findings of Fact

The claim identifies “HB 3241, 42, 43, 44, 45, 46, 47, 48, 49, and HB 2643” as restrictions limiting the use of the claimants’ property. It is not clear to what regulations these restrictions refer, when they were enacted or adopted, or by what jurisdiction. The laws that restrict the claimants’ use of their property relative to uses permitted when they acquired it in 1973, include applicable provisions of Statewide Planning Goal 3 (Agricultural Lands), ORS 215 and OAR 660, division 33, which Washington County has implemented through its EFU zone. With the exception of provisions of ORS 215 which may have been applicable to the property when the claimants acquired it in 1973, none of these laws are exempt, under ORS 197.352(3)(E). Depending on the local zoning in effect in 1973, provisions of ORS 215 then in effect may be exempt under ORS 197.352(3)(E), which exempts laws in effect when the claimants acquired the property.

Conclusions

Without a specific development proposal for the property, it is not possible for the department to determine all the laws that may apply to a particular use of the property, or whether those laws may fall under one or more of the exemptions under ORS 197.352. It appears that the general statutory, goal and rule restrictions on residential development and use of agricultural land apply to the claimants' use of the property, and for the most part these laws would not come under ORS 197.352(3)(E). Depending on the local zoning in effect in 1973, provisions of ORS 215, in effect in 1973, may have applied to the property when the claimants acquired it and would continue to apply to the claimants' use of the property.

Other laws in effect with 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. 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 what 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 use that the claimants have identified. Similarly, the 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 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 a law to allow the present owners to carry out a use of the property permitted at the time the present owners 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 conclusion set forth in this report, laws enacted or enforced by the Commission or the department restrict the claimants' ability the subject 7.09-acre property into two or three parcels, and to develop a dwelling on each parcel. The claim asserts that laws enacted or enforced by the Commission or department reduce the fair market value of the property by \$300,000 per developable acre. However, because the claim does not provide an appraisal or other documentation, 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 one or more land use regulations to allow the claimants to use the subject property for a use allowed at the time they acquired the property on February 7, 1973.

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 John and Vicki Oberg's division of their property into two or three parcels and to their development of a dwelling on each parcel: applicable provisions of Statewide Planning Goal 3 (Agricultural Lands), ORS 215 and OAR 660, division 33. These laws will not apply to the claimants only to the extent necessary to allow them to use the subject property for the use described in this report, to the extent that use was permitted at the time they acquired the property on February 9, 1973.
2. The action by the State of Oregon provides the state's authorization to the claimants to use the property for the use described in this report, subject to the standards in effect on February 9, 1973, including the provisions of ORS 215 then in effect, if applicable.
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 20, 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.