

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. M118443
(BALLOT MEASURE 37) OF)	
Indian Hills Development Partnership,)	
Louis R. Giottonini, Managing Partner , CLAIMANT)	

Claimant: Indian Hills Development Partnership, Louis R. Giottonini, Managing Partner
(the Claimant)

Property: Tax lot 1130, Township 36S, Range 14W, Section 00, Curry County (the Property)

Claim: The demand for compensation and any supporting information received from the
Claimants 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 denied as to laws administered by DLCD and the Land Conservation and Development Commission (LCDC) for the reasons set forth in the DLCD Report.

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 chapter 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 chapter 125, division 145 and ORS chapter 293.

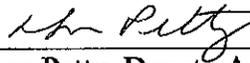
FOR DLCD AND THE LAND CONSERVATION
AND DEVELOPMENT COMMISSION:



Lane Shetterly, Director
DLCD

Dated this 27th day of March, 2006.

FOR the DEPARTMENT OF ADMINISTRATIVE
SERVICES:



Dugan Petty, Deputy Administrator
DAS, State Services Division

Dated this 27th 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)

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 27, 2006

STATE CLAIM NUMBER: M118443

NAME OF CLAIMANT: Indian Hills Development Partnership
Louis R. Giottonini, Managing Partner

MAILING ADDRESS: P.O. Box 13
Wetterburn, OR 97491

PROPERTY IDENTIFICATION: Township 36S, Range 14W, Section 00
Tax lot 1130
Curry County

DATE RECEIVED BY DAS: May 17, 2005

180-DAY DEADLINE: April 1, 2006¹

I. SUMMARY OF CLAIM

The claimant, Indian Hills Development Partnership, seeks compensation in the amount of \$2,000,000 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 divide the 120 acre property into five-acre parcels for residential development. The property has no street address and is located at the locational coordinates listed above in Curry 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 not valid because neither the Land Conservation and Development Commission (the Commission) nor the department have enforced laws that restrict the claimant's proposed use of private real property relative to uses permitted when the claimant acquired the property on January 12, 1994. (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 23, 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, 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

This claim was submitted to DAS on May 17, 2005, for processing under OAR 125, division 145. The claim identifies Goal 2 (Land Use Planning), Goal 3 (Agricultural Lands) and Goal 4 (Forest Lands), OAR 660-04-0028 and OAR 660-04-025, 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.)

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

Louis Giottonini, and Bobbie Sue Giottonini first acquired the subject property on December 7, 1978, as reflected by a Warranty Deed included with the claim.³ Louis Giottonini, Mary Giottonini, Wilbur Andreson, Patricia Andreson, James Waltz and Vicki Waltz formed the Indian Hills Development Partnership, an Oregon Partnership on January 1, 1994, and appointed Louis Giottonini Managing Partner. Louis Giottonini, Mary Giottonini, Wilbur Andreson, Patricia Andreson, James Waltz and Vicki Waltz conveyed their interests in the subject property to Indian Hills Development Partnership through a Bargain and Sale Deed dated January 12, 1994. The transfer of ownership to a partnership is a change of ownership for the purposes of ORS 197.352. Indian Hills Development Partnership is the current owner of the property.

Conclusions

The claimant, Indian Hills Development Partnership, is an “owner” of the subject property, as that term is defined by ORS 197.352(11)(C), as of January 12, 1994. There is no “family ownership” of the partnership as that term is defined by ORS 197.352 (11)(A).

2. The Laws that are the Basis for this Claim

In order to establish a valid claim, ORS 197.352(1) requires, in part, that a law must restrict the 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 lists the restricting regulations as OAR 660-04-0028, OAR 660-04-0025, and LCDC State Planning Goals 2 (Land Use Planning), 3 (Agricultural Lands), and 4 (Forest Lands). The claim identifies Section 9.030 of the Curry County Land Use Code as a restricting ordinance.⁴

³ Wilbur Andreson and Patricia Andreson acquired their interests in the subject property on July 27, 1979, as reflected by a Warranty Deed. James Waltz and Vicki Waltz acquired their interests in the subject property on August 31, 1984.

⁴ Curry County Land Use Ordinance Section 9.030 - Application for a Plan Amendment, requires the application of the Goal 2 Land Use Planning exceptions process for specific types of plan changes. The requirements prescribed by this section of the code do not apply to the property, nor restrict its use, but rather establish the process and standards to be conducted by the county in making plan changes. Goal 2 and the standards it establishes for local

The claim also summarily cites several statewide planning goals and provisions of OAR 660, division 4, that do not on their face appear to restrict the use of the property. With the exception of laws discussed below, in the absence of any explanation by the claimant as to how those cited regulations restrict the use of the property, this report does not address those regulations.

The property is currently designated and zoned Forest Grazing (FG) by Curry County. The FG zone is a mixed agricultural and forest land zone, adopted to comply with Statewide Goal 4 (Forest Lands) and the implementing provisions of OAR 660-006-0050 (effective February 5, 1990) and subsequently amended on March 1, 1994, to comply with the provisions of HB 3661 (Chapter 792, Oregon Laws 1993).⁵

ORS 215.780 established an 80-acre minimum size for the creation of new lots or parcels in forest zones and became effective November 4, 1993 (Chapter 792, Oregon Laws 1993).

Under OAR 660-006-0050, all the uses permitted under Statewide Planning Goals 3 and 4 are allowed, except that for dwellings and either the Goal 3 or Goal 4 standards are applicable based on the predominant use of the tract on January 1, 1993. No information was provided in the claim showing the predominant use of the subject property on January 1, 1993. Depending on the predominate use of the property on January 1, 1993, the property is subject to either the requirements for dwellings under exclusive farm use zoning required by Goal 3 and OAR 660, division 33 or the forest zone provisions required Goal 4 and OAR 660, division 6. This includes the land division and dwelling standards asserted by the claimant as restricting the use of the subject property. However, no analysis of whether the property can be approved for dwellings under the applicable farm or forest provisions has been provided.

For land divisions, OAR 660-006-0055 authorizes the creation of new parcels based on the standards applicable to farm or forest zones, which implement the 80-acre minimum lot size specified in ORS 215.780. Under OAR 660-006-0055, the claimant's property cannot be divided into parcels smaller than 80 acres.

The County's acknowledged Forest Grazing zone and the provisions of ORS 215 and OAR 660, division 6 applied to the subject property when it was acquired by the claimant in 1994. When the claimant acquired the property in 1994, ORS 215.780 prohibited the division of the property into parcels of less than 80 acres. Therefore, the claimant could not use the subject property in the manner described in this report.

governments to follow in conducting goal exceptions and plan amendments were first established and became applicable to all jurisdictions in 1975. The Goal 2 element of the Curry County Comprehensive Plan and Zoning Ordinance was acknowledged in 1984.

⁵ The Curry County Comprehensive Plan and Zoning Ordinance, including the elements that applied Goal 3 and Goal 4, were substantially acknowledged by the Commission on February 3, 1984.

Conclusions

The claim does not identify any state law that restricts the use of the claimant's property in a manner that reduces the fair market value of the property relative to how the property could have been used when the claimant acquired it in 1994. Based on the record, neither the Commission nor the department has enforced any laws that restrict the use of the claimant's real property relative to uses permitted when it acquired the subject property.

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 \$2,000,000 as the reduction in the property's fair market value as a result of current regulations. This estimate is based on the claimant's estimate of the market value of 24 five-acre parcels, less the property's value as currently zoned.

Conclusions

As determined in Section V.(2) above, the claimant has not identified any laws that have restricted the use of the subject property relative to uses permitted when the claimant acquired the property in 1994. Accordingly, the claimant has not established that land use regulations enacted after it acquired the property have had the effect of reducing the fair market value of the property.

4. Exemptions under ORS 197.352 (3)

ORS 197.352 does not apply to certain land use regulations. In addition, under ORS 197.352(3), certain types of laws are exempt from ORS 197.352.

Findings of Fact

The claim is based on land use regulations that restrict the use of the property relative to what would have been allowed in January 1994, when the property was acquired by Indian Hills Development Partnership. Based on the record, the claim does not identify state laws enforced by the Commission or the department that restrict the use of the subject property relative to uses permitted when the claimant acquired the property.

Conclusions

Because there are not state laws that restrict the claimant's use of the subject property, the exemption provisions of ORS 197.352(3) are not applicable to this claim.

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 claim.

Findings of Fact

Based on the record for this claim, the claimant has not established that any state laws enforced by the Commission or the department restrict the use of its 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 claimant acquired the property in 1994. ORS 215.780 was in effect in 1994, and did not allow the claimant to divide the subject property.

Conclusion

Based on the record, the claimant, Indian Hills Development Partnership, has not established that it is entitled to relief under ORS 197.352(1). Therefore, this claim is denied.

VII. COMMENTS ON THE DRAFT STAFF REPORT

The department issued its draft staff report on this claim on October 21, 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.