

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. M118473
(BALLOT MEASURE 37) OF)
Donald B. Bowerman, Elizabeth D. Bowerman)
and Patsy Fitzwater CLAIMANTS)

Claimants: Donald B. Bowerman, Elizabeth D. Bowerman and Patsy Fitzwater
(the Claimants)

Property: Tax lots 600, 601 and 602, Township 3S, Range 1E, Section 9, 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 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 Donald Bowerman's, Elizabeth Bowerman's, and Patsy Fitzwater's division of the 72.22-acre property into approximately one-acre parcels, or to their development of a dwelling on each parcel: applicable provisions of Statewide Planning Goal 4 (Forest Lands) and Goal 14 (Urbanization), ORS 215, and OAR 660 division 6. These land use regulations will not apply to Donald Bowerman's, Elizabeth Bowerman's, and Patsy Fitzwater's use of their property only to the extent necessary to allow the claimants to use the property for the use described in this report, to the extent that use was permitted at the time they acquired the property on October 1, 1968.
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 October 1, 1968.

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 Clackamas County or other jurisdiction 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:

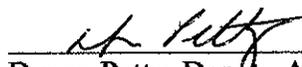
Lane Shetterly, Director



George Naughton, Deputy Director
DLCD

Dated this 28th day of March, 2006.

FOR the DEPARTMENT OF ADMINISTRATIVE
SERVICES:



Dugan Petty, Deputy Administrator
DAS, State Services Division

Dated this 28th day of March, 2006.

NOTICE OF RIGHT TO APPEAL OR OTHER JUDICIAL RELIEF

You are entitled, or may be entitled, to judicial remedies including the following:

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 28, 2006

STATE CLAIM NUMBER: M118473

NAMES OF CLAIMANTS: Donald B. Bowerman
Elizabeth D. Bowerman
Patsy Fitzwater

MAILING ADDRESS: Donald and Elizabeth Bowerman
Post Office Box 100
Oregon City, Oregon 97045

Patsy Fitzwater
1650 SE River Ridge Road
Milwaukie, Oregon 97222

PROPERTY IDENTIFICATION: Township 3S, Range 1E, Section 9
Tax lots 600, 601 and 602
Clackamas County

OTHER INTEREST IN PROPERTY: United States – Bonneville Power
Administration (electric transmission line
easement)

DATE RECEIVED BY DAS: May 19, 2005

180-DAY DEADLINE: April 3, 2006¹

I. SUMMARY OF CLAIM

The claimants, Donald B. Bowerman, Elizabeth D. Bowerman, and Patsy R. Fitzwater, seek compensation in the amount of \$13,654,460² 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 72.22-acre property into

¹ This date reflects 180 days from the date the claim was submitted as extended by the 139 days enforcement of Ballot 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' Measure 37 claim to Clackamas County requests \$14,400,000. See copy of Clackamas County Board of Commissioner's Order No. 2005-108 in the department's claim file.

approximately one-acre parcels and to develop a single-family dwelling on each parcel.³ The property does not have a street address and is located on the west side of SW Pete's Mountain Road, in Clackamas 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 Donald Bowerman's, Elizabeth Bowerman's and Patsy Fitzwater's division of the property into one-acre parcels or to their development of a dwelling on each parcel: applicable provisions of Statewide Planning Goal 4 (Forest Lands), Goal 14 (Urbanization), ORS 215, and OAR 660 division 6. These laws will not apply to the claimants only to the extent necessary to allow Donald Bowerman, Elizabeth Bowerman, and Patsy Fitzwater to use the property for the use described in this report, to the extent that use was permitted at the time they acquired the property in 1968. (See the complete recommendation in Section VI. of this report.)

III. COMMENTS ON THE CLAIM

Comments Received

On August 12, 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, three written comments, evidence or information were received in response to the 10-day notice.

The comments do not address whether the claim meets the criteria for relief (compensation or waiver) under ORS 197.352 (Ballot Measure 37). 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 letters in the department's claim file.)

IV. TIMELINESS OF CLAIM

Requirement

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

³ The claimants' State Measure 37 claim form does not state a proposed use; however, the Board of County Commissioners of Clackamas County Order No. 2005-108, dated May 18 2005, states: "The claimants are requesting to create one-acre parcels for single-family residences." (See order forwarded by claimant Donald Bowerman on August 12, 2005, copy in the department's claim file.)

1. For claims arising from land use regulations enacted prior to the effective date of Ballot Measure 37 (December 2, 2004), within two years of that effective date or the date the public entity applies the land use regulation as an approval criterion 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 Ballot Measure 37 (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 criterion, whichever is later.

Findings of Fact

This claim was submitted to DAS on May 19, 2005, for processing under OAR 125, division 145. The claim identifies Senate Bill 100 (1973), House Bill 3661, ORS 215, and OAR 660-006-0027(1) 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 Ballot 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 Ballot 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, Donald B. Bowerman and Elizabeth D. Bowerman, acquired the subject property by Land Sales Contract on October 1, 1968. Patsy R. Fitzwater acquired an undivided one-half interest in the subject property by an Assignment of Land Sales Contract on October 1, 1968.

Conclusions

The claimants, Donald Bowerman, Elizabeth Bowerman, and Patsy Fitzwater, are “owners” of the subject property, as that term is defined by ORS 197.352(11)(C), as of October 1, 1968.⁴

⁴ According to Clackamas County staff, the subject property (tax lots 600, 601, and 602) constitutes one legal lot of record. In 1993, claimants attempted to convey tax lot 600 to Elizabeth Bowerman, tax lot 601 to Donald Bowerman, and tax lot 602 to Patsy Fitzwater, respectively. In 1995, Elizabeth Bowerman attempted to convey tax

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 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 of Fact

The claim cites: "Senate Bill 100 (1973) and all regulatory enactments adopted thereafter including but not limited to House Bill 3661, ORS Chapter 215 and Rules set forth in Oregon Administrative Rules (OAR) goals and regulatory restrictions," and "ORS 215.705 (effective 11/93); ORS 215.780(1)(c)(effective 11/93); OAR 660-006-0026(1)(a)(effective 3/1/94); and OAR 660-006-0027(1)(effective 3/1/94)" as the state laws that have restricted the property so that it cannot be divided for residential development.

The claim is based, generally, on the County's Timber District (TBR) zone, and state laws that require that zoning. The property is zoned TBR, as required by Statewide Planning Goal 4 (Forest Lands) and the provisions applicable to land zoned for forest use under ORS 215 and OAR 660 division 6. Goal 4 became effective on January 25, 1975, and required forest land as defined by the Goal to be zoned for forest use.⁵ (See citations to statutory and rule history under OAR 660-015-0000(4).)

The forest land administrative rule, OAR 660 division 6, became effect September 1, 1982. ORS 215.705 to 215.755 and 215.780 became effective November 4, 1993 (Chapter 92, Or Laws 1993) and were implemented by OAR 660-006-0026 on March 1, 1994. (See citations to rule history under OAR 660-006-0026 and 0027.) ORS 215.703(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 OR 660-066-0026 and -0027 establish an 80-acre minimum lot size for the creation of new parcels in a forest zone and also establish the standards for dwellings in forest zones.

lot 600 to herself and Donald Bowerman's son and daughter-in-law, who in 2002, attempted to convey this tax lot back to Elizabeth Bowerman. On August 2, 2005, the Clackamas County Circuit Court issued a General Judgment for Rescission and Declaratory Relief, which voided the 1995 and 2002 deeds for tax lot 600. (See County staff correspondence with department staff, in the department's claim file.)

⁵ The subject property is forest land because it consists of Saum silt loam, 8-15% slopes (subclass IIIe) and 15-30% slopes (subclass IVe), with a site index for Douglas Fir ranging from 125 to 145 and potential production per acre of merchantable timber of 8,280 cubic feet from an even-aged, fully-stocked stand of trees 60 years old, or 72,080 board feet from an even-aged, fully-stocked stand of trees 80 years old. (See Soil Survey of Clackamas County, Oregon Area, USDA Soil Conservation Service, November 1985, sheet #21 and pages 97-98.)

Statewide Planning Goal 14 would likely apply to the division of the claimants' property into parcels of less than two acres in size. Goal 14 generally requires that land outside of urban growth boundaries be used for rural uses. Goal 14 became effective on January 25, 1975. The claimants acquired the subject property on October 1, 1968, prior to the establishment of the statewide planning goals and their implementing statutes and rules. Clackamas County's General Use (GU) zoning applied to the subject property in 1968.⁶

Conclusions

The zoning requirements and minimum lot size and dwelling standards established by Statewide Planning Goal 4 (Forest Lands), Goal 14 (Urbanization), ORS 215 and OAR 660 division 6, were all adopted after the claimants acquired the subject property in 1968, and restrict the use of the subject property relative to the uses allowed when the claimants acquired the property.

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 \$13,654,460 as the reduction in the property's fair market value due to current regulations. The claim includes the following calculation based on

"Assessor's RMV for view home sites @ \$200,000 and Assessor's RMV for 1 acre home site":

"Tax Lot 600 (buildable) @ 424,000	versus \$200,000 value	
Tax lot 601 (buildable) @ 198,000		x 72 acres
Tax lot 602 (buildable) @ 123,540	=	\$14,400,000."

The claim includes no appraisal to substantiate the amount demanded.⁷

⁶ At that time, the GU zone minimum lot size standard was 20,000 square feet with public water available and one acre without public water. The record does not indicate which of these standards applied to claimants' property in 1968.

⁷ Clackamas County Assessor records show a current real market value of \$1,528,713 for the subject property: \$423,964 for tax lot 600, \$651,801 for tax lot 601, and \$452,948 for tax lot 602. See department's claim file.

Conclusions

As explained in Section V.(1) of this report, the current owners are Donald Bowerman, Elizabeth Bowerman, and Patsy Fitzwater, who acquired the property on October 1, 1968. 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), laws adopted since 1968, restrict the claimants' ability to divide and develop the subject property for residential use. The claim estimates the reduction in value due to these restrictions to be \$13,654,460.

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 is based on land use regulations that restrict the claimants' use of the property relative to uses allowed when the claimants acquired the property, including Statewide Planning Goals 4 and 14, and applicable provisions of ORS 215 and OAR 660 division 6. These were all adopted after the claimants acquired the property and thus none of these laws are exempt under ORS 197.352(3)(E), which exempts laws in effect at the time the claimants acquired the property.

The department notes that ORS 215.730 and OAR 660 division 6 include standards for the siting of dwellings in forest zones. These provisions include fire protection standards for dwellings 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 division and residential development of forest land apply to the claimants' use of the property, and for the most part these laws are not exempt under ORS 197.352(3)(E).

Laws in effect when the claimants acquired the property are exempt under ORS 197.352(3)(E), and will continue to apply to the claimants' use of the property. In addition, those provisions of ORS 215.730 and OAR 660 division 6 that establish fire safety sitting standards are exempt under ORS 197.352(3)(B) 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 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 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 division of the subject property into approximately one-acre parcels. The claim asserts the laws enforced by the Commission or department reduce the fair market value of the subject property by \$13,654,460. 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 Donald Bowerman, Elizabeth Bowerman, and Patsy Fitzwater to use the subject property for a use permitted at the time they acquired the property on October 1, 1968.

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 Donald Bowerman's, Elizabeth Bowerman's, and Patsy Fitzwater's division of the 72.22-acre property into approximately one-acre parcels, or to their development of a dwelling on each parcel: applicable provisions of Statewide Planning Goal 4 (Forest Lands) and Goal 14 (Urbanization), ORS 215, and OAR 660 division 6. These land use regulations will not apply to Donald Bowerman's, Elizabeth Bowerman's, and Patsy Fitzwater's use of their property only to the extent necessary to allow the claimants to use the property for the use described in this report, to the extent that use was permitted at the time they acquired the property on October 1, 1968.
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 October 1, 1968.
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 Clackamas County or other jurisdiction 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 March 13, 2006. 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.