

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. M118485
(BALLOT MEASURE 37) OF)
William Earl Geissler and Dixie D. Geissler,)
CLAIMANTS)

Claimants: William Earl Geissler and Dixie D. Geissler (the Claimants)

Property: Tax lot 900, Township 1S, Range 4E, Section 25, 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 just compensation, the State of Oregon will not apply the requirements of the following law enforced by the Commission or the department to the claimants to allow them to divide the subject property into two parcels for residential development: applicable provisions of Statewide Planning Goal 14 (Urbanization) and OAR 660 division 004, enacted after July 1, 1974. These laws will not apply to the claimants' use of the subject property only to the extent necessary to allow them to use property for the use described in this report, and only to the extent that use was permitted when they acquired the property on July 1, 1974.
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 July 1, 1974, including the applicable provisions of ORS 215, including the Interim Land Use Goals set forth in ORS 215.515, 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 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 Condition 1 above; (b) any laws enacted or enforced by a public entity other than the Commission or the department; and (c) those laws not subject to ORS 197.352 including, without limitation, those laws exempted under ORS 197.352(3).

5. Without limiting the generality of the foregoing terms and conditions, in order for the claimants to use the property, it may be necessary for them to obtain a decision under ORS 197.352, from a city and/or county and/or metropolitan service district that enforces land use regulations applicable to the property. Nothing in this order relieves the claimants from the necessity of obtaining a decision under ORS 197.352, from a local public entity that has jurisdiction to enforce a land use regulation applicable to a use of the property by the claimants.

This Order is entered by the Director of the DLCD as a final order of DLCD and the Land Conservation and Development Commission under ORS 197.352, OAR 660-002-0010(8), and OAR 125, division 145, and by the Deputy Administrator for the State Services Division of the DAS as a final order of DAS under ORS 197.352, OAR 125, division 145, and ORS 293.

FOR DLCD AND THE LAND CONSERVATION
AND DEVELOPMENT COMMISSION:



Lane Shetterly, Director
DLCD
Dated this 31st day of March, 2006.

FOR the DEPARTMENT OF ADMINISTRATIVE
SERVICES:



Dugan Petty, Deputy Administrator
DAS, State Services Division
Dated this 31st 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 31, 2006

STATE CLAIM NUMBER: M118485

NAMES OF CLAIMANTS: William Earl Geissler
Dixie D. Geissler

MAILING ADDRESS: 38360 Southeast Lusted Road
Boring, Oregon 97009

PROPERTY IDENTIFICATION: Township 1S, Range 4E, Section 25
Tax lot 900
Clackamas County

DATE RECEIVED BY DAS: May 23, 2005

180-DAY DEADLINE: April 7, 2006¹

I. SUMMARY OF CLAIM

The claimants, William Earl and Dixie D. Geissler, seek compensation in the amount of \$199,000 for a 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 their 2.30-acre property into two parcels for residential development. The property is located at 38360 Southeast Lusted Road, in Boring, 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 this 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 Mr. and Ms. Geissler's division of the property into two parcels for residential development: Statewide Planning Goal 14 (Urbanization), and OAR 660-004-0040. These laws will not apply to the claimants only to the extent necessary to allow the claimants to use the

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).

property for the use described in this report, and only to the extent that use was permitted at the time they acquired the property in 1974. (See the complete recommendation in Section VI. of this report.)

III. COMMENTS RECEIVED

On July 19, 2005, pursuant to OAR 125-145-0080, the Oregon Department of Administrative Services (DAS) provided written notice to owners of surrounding properties. According to DAS, two written comments, evidence or information were received in response to the 10-day notice.

One set of comments does 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.

The other set of comments is relevant to whether the restriction of the claimants' use of the property reduces the fair market value of the property. Those comments have been considered by the department in preparing this report. (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:

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 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 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 criteria, whichever is later.

Findings of Fact

This claim was submitted to DAS on May 23, 2005, for processing under OAR 125, division 145. The claim identifies OAR 660-004-0040 as the law that restricts 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 regulation 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, William Earl and Dixie D. Geissler, acquired the subject property on July 1, 1974, as reflected by a Warranty Deed included with the claim. Clackamas County tax records submitted with the claim confirm that Mr. and Ms. Geissler are the current owners of the subject property.

Conclusions

The claimants, William Earl and Dixie D. Geissler, are “owners” of the subject property as that term is defined in ORS 197.352(11)(C), as of July 1, 1974.

2. The Laws that are the Basis for the 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 states that “OAR 660-004-0040 7a... prohibits one (1) acre lot as allowed at purchase in 1974.”

The subject property is approximately 2.3 acres in size and is developed with a single-family dwelling. The property is currently included in a Clackamas County RRF-5 zoning district, which is a rural residential zone with a minimum parcel size of five acres, in accord with Statewide Planning Goal 14 (Urbanization). The subject property cannot be divided under the RRF-5 zone.

Goal 14 became effective on January 25, 1975, and required local comprehensive plans to provide for an orderly and efficient transition from rural to urban land use. The courts have

found that Goal 14 generally prohibits residential development at urban densities on rural lands. Rural lands are lands outside of an urban growth boundary (UGB). As interpreted by the courts and the Commission, Goal 14 generally prohibits residential development outside of an urban growth boundary where lot or parcel sizes are less than two acres. (See, e.g. *1000 Friends of Oregon v. LCDC (Curry County)*, 301 Or 447 (1986); *DLCD v. Klamath County*, 38 Or LUBA 769 (2000).) As a result of the 1986 *Curry County* Oregon Supreme Court decision, the Commission amended Statewide Planning Goal 14 (Urbanization) and adopted OAR 660-004-0040, establishing rules for rural residential development outside urban growth boundaries, which became effective on October 4, 2000. OAR 660-004-0040 requires a minimum lot size of two acres for rural residential development and restricts zone changes to allow a higher density of development.

When the claimants acquired the property, it was zoned RA-1 by Clackamas County. The RA-1 zone required a one-acre minimum lot size subject to partitioning and sewer and water issues being satisfied. However, the claimants acquired the subject property after the October 4, 1973, effective date of Senate Bill 100, but prior to the adoption of the statewide planning goals and their implementing statutes and rules. During the period between October 4, 1973, and January 25, 1975, when the statewide planning goals became effective, ORS 197.175(1) and 197.280 (1973 edition) required, in addition to any local plan or zoning provisions, the application of Interim Land Use Goals set forth in ORS 215.515 (1973 edition) to the exercise of planning and zoning responsibilities prior to the effective date of the statewide planning goals (see *Peterson v. Klamath Falls*, 279 Or 249 (1977)).¹

No information has been provided establishing whether or to what extent the claimants' desired division of the property for residential development complies with the Interim Land Use Goals set forth in ORS 215.515 (1973 edition) in effect at the time the claimants acquired the property on July 1, 1974.

Conclusions

The zoning requirements, minimum lot size and dwelling standards for rural residential parcels established by OAR 660-004-0040 were enacted after William Earl and Dixie D. Geissler acquired the subject property on July 1, 1974, 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 Geisslers in 1974. However, the claim does not establish whether or to what

¹ The "interim" land use goals are set forth in ORS 215.515(1)(a) to (j) as follows: (a) "To preserve the quality of the air, water and land resources of the state," (b) "To conserve open space and protect natural and scenic resources," (c) "To provide for the recreational needs of citizens of the state and visitors," (d) "To conserve prime farm lands for the production of crops," (e) "To provide for the orderly and efficient transition from rural to urban land use," (f) "To protect life and property in areas subject to floods, landslides and other natural disasters," (g) "To provide and encourage a safe, convenient and economic transportation system including all modes of transportation: Air, water, rail, highway and mass transit and recognizing differences in the social costs in the various modes of transportation," (h) "To develop a timely, orderly and efficient arrangement of public facilities and services to serve as a framework for urban and rural development," (i) "To diversify and improve the economy of the state," and (j) "To ensure that development of properties within the state is commensurate with the character and the physical limitations of the land." (ORS 215.515, 1973 edition).

extent the claimants' requested division of the property would have been permitted under the Interim Land Use Goals set forth in ORS 215.515 (1973 edition) in effect 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 laws 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 \$199,000 as the reduction in the property's fair market value due to current regulations. This amount is based on the claimants' estimate of the value of the property put to the requested use, less estimated development costs.

Conclusions

As explained in Section V.(1) of this report, the current owners of the subject property are William Earl and Dixie D. Geissler who acquired it on July 1, 1974. Under ORS 197.352, the Geisslers are due compensation for land use regulations that restrict the use of the subject property in a manner that reduces its fair market value. Based on the findings and conclusions in Section V.(2) of this report, laws adopted since the claimants acquired the property restrict division of the subject property. The claimants estimate the reduction in value due to the restrictions to be \$199,000.

Without an appraisal or other documentation, and without verification that the requested use would have been permitted under the laws in effect when claimants acquired the property, it is not possible to substantiate the specific dollar amount that 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 OAR 660-004-0040, which restricts the use of the property relative to what may have been allowed in 1974 when the claimants acquired it. These laws are not exempt to the extent they were enacted after the claimants acquired the property on July 1, 1974. Applicable provisions of ORS 215, including the Interim Land Use Goals set forth at ORS 215.515, in effect when claimants acquired the property, are 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 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 of rural residential property apply to the claimants' use of the property, and these laws are not exempt under ORS 197.352(3)(E), to the extent they were enacted after the claimants acquired the property on July 1, 1974. Provisions of ORS 215, including the Interim Land Use Goals, in effect when the claimants acquired the property are exempt under ORS 197.352(3)(E) and will continue to apply to the property.

Other laws in effect when the claimants acquired the property are also exempt under ORS 197.352(3)(E), and will continue to apply to the claimants' use of the property. 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. 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 to allow the present owner to carry out a use of the property permitted at the time the present 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 record before the department, laws enforced by the Commission or the department restrict the division of the property into two parcels for residential development. The claim asserts that laws enforced by the Commission or the department reduce the fair market value of the subject property by \$199,000. Without an appraisal or other documentation, and without verification that the requested use would have been permitted under the laws in effect when claimants acquired the property, it is not possible to substantiate the specific dollar amount that 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.

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 William Earl and Dixie D. Geissler to use the subject property for a use permitted at the time they acquired the property on July 1, 1974.

Conclusion

Based on the record, the department recommends that the claim be approved, subject to the following terms:

1. In lieu of just compensation, the State of Oregon will not apply the requirements of the following law enforced by the Commission or the department to the claimants to allow them to divide the subject property into two parcels for residential development: applicable provisions of Statewide Planning Goal 14 (Urbanization) and OAR 660 division 004, enacted after July 1, 1974. These laws will not apply to the claimants' use of the subject property only to the extent necessary to allow them to use property for the use described in this report, and only to the extent that use was permitted when they acquired the property on July 1, 1974.
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 July 1, 1974, including the applicable provisions of ORS 215, including the Interim Land Use Goals set forth in ORS 215.515, 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 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 Condition 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 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.