

BEFORE THE DEPARTMENT OF ADMINISTRATIVE SERVICES,
THE DEPARTMENT OF LAND CONSERVATION AND DEVELOPMENT AND
THE WATER RESOURCES DEPARTMENT OF
THE STATE OF OREGON

IN THE MATTER OF THE CLAIM FOR)	FINAL ORDER
COMPENSATION UNDER ORS 197.352)	CLAIM NO. M118537
(BALLOT MEASURE 37) OF)	
Bruce M. Hall, CLAIMANT)	

Claimant: Bruce M. Hall (the Claimant)

Property: Township 3S, Range 2W, Section 27, Tax lot 1201
Township 3S, Range 2W, Section 33, Tax lots 100 and 200
Yamhill County (the Property)

Claim: The demand for compensation and any supporting information received from the Claimant by the State of Oregon (the Claim).

Claimant submitted the Claim to the State of Oregon under ORS 197.352. Under OAR 125-145-0010 *et seq.*, the Department of Administrative Services (DAS) referred the Claim to the Department of Land Conservation and Development (DLCD) as the regulating entity. This order is based on the record herein, including the Findings and Conclusions set forth in the Final Staff Report and Recommendation of DLCD (the DLCD Report) and the Oregon Water Resources Department (the WRD Report) both attached to and by this reference incorporated into this order.

ORDER

The Claim is denied as to laws administered by the Oregon Water Resources Department for the reasons set forth in the WRD Report.

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 Bruce Hall's division of the 202-acre property into 12 to 14 parcels or to his development of a dwelling on each parcel: applicable provisions of Goals 3 and 15, ORS 215 and OAR 660, division 33, enacted or adopted after October 2, 1975. These land use regulations will not apply to the claimant only to the extent necessary to allow him to use the subject property for the use described in this report, and only to the extent that use was permitted when he acquired the property on October 2, 1975.

2. The action by the State of Oregon provides the state's authorization to the claimant to use the subject property for the use described in this report, subject to the standards in effect on October 2, 1975. On that date, the property was subject to applicable provisions of Goal 3 and ORS 215 then in effect.

3. To the extent that any law, order, deed, agreement or other legally enforceable public or private requirement provides that the subject property may not be used without a permit, license or other form of authorization or consent, the order will not authorize the use of the property unless the claimant first obtains that permit, license or other form of authorization or consent. Such requirements may include, but are not limited to: a building permit, a land use decision, a "permit" as defined in ORS 215.402 or 227.160, other permits or authorizations from local, state or federal agencies and restrictions on the use of the subject property imposed by private parties.

4. Any use of the subject property by the claimant under the terms of the order will remain subject to the following laws: (a) those laws not specified in (1) above; (b) any laws enacted or enforced by a public entity other than the Commission or the department; and (c) those laws not subject to ORS 197.352 including, without limitation, those laws exempted under ORS 197.352(3).

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

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, and by the Director of the WRD as a final order under ORS 197.352, OAR 125, division 145.

FOR DLCD AND THE LAND CONSERVATION
AND DEVELOPMENT COMMISSION:

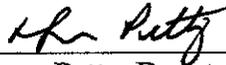
Lane Shetterly, Director



George Naughton, Deputy Director
DLCD

Dated this 11th day of April, 2006.

FOR the DEPARTMENT OF ADMINISTRATIVE
SERVICES:



Dugan Petty, Deputy Administrator
DAS, State Services Division

Dated this 11th day of April, 2006.

FOR THE OREGON WATER RESOURCES
DEPARTMENT



Phillip C. Ward, Director
Water Resources Department

Dated this 11th day of April, 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

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

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."

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.

ORS 197.352 (BALLOT MEASURE 37) CLAIM FOR COMPENSATION
OREGON DEPARTMENT OF LAND CONSERVATION AND DEVELOPMENT
Final Staff Report and Recommendation

April 11, 2006

STATE CLAIM NUMBER: MI18537

NAME OF CLAIMANT: Bruce M. Hall

MAILING ADDRESS: 1454 Southwest Highland Road
Portland, Oregon 97221

PROPERTY IDENTIFICATION: Township 3S, Range 2W, Section 27
Tax lot 1201
Township 3S, Range 2W, Section 33
Tax lots 100 and 200
Yamhill County

DATE RECEIVED BY DAS: May 31, 2005

180-DAY DEADLINE: April 15, 2006¹

I. SUMMARY OF CLAIM

The claimant, Bruce Hall, seeks compensation in the amount of \$2,192,924 for the reduction in fair market value as a result of 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 202-acre property into 12 to 14 parcels and to develop a dwelling on each parcel. The subject property is located at 8000 Parrish Road, near Newberg, in Yamhill 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 claimant, Bruce Hall's division of the 202-acre property into 12 to 14 parcels and to his development of a dwelling on each parcel: applicable provisions of Statewide Planning Goal 3 (Agricultural Lands), ORS 215 and Oregon Administrative Rules (OAR) 660, division 33, enacted or adopted after October 2, 1975. These laws will not apply to the claimant only to the extent necessary to allow him to use the subject property for the use described in this

¹ This date reflects 180 days from the date the claim was submitted, as extended by the 139 days that all timelines under Measure 37 were suspended during the pendency of *MacPherson v. Dept. of Admin. Svcs.*, 340 Or 117 (2006).

report, and only to the extent that use was permitted when he acquired the property on October 2, 1975. (See the complete recommendation in Section VI. of this report.)

III. COMMENTS ON THE CLAIM

Comments Received

On July 11, 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.

Two of the comments did not address whether the claim meets the criteria for relief under ORS 197.352. Comments concerning the effects a use of the subject property may have on surrounding areas are generally 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 waive a state law.

One comment is relevant to whether the restriction of the claimant's use of the subject property reduces the fair market value of the property and whether state agencies can waive state statutes. The comments have been considered by the department in preparing this report. (See the 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 Measure 37 (December 2, 2004), within two years of that effective date, as extended by the 139 days enforcement of the Measure was suspended during the pendency of the *MacPherson v. DAS* appeal, 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 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 31, 2005, for processing under OAR 125, division 145. The claim identifies Sections 402.03(A) and 403 of the Yamhill County's EF-80 zone, an Exclusive Farm Use (EFU) zone under the provisions of ORS 215, as the basis for the claim. Only laws that were enacted or adopted prior to December 2, 2004, are the basis for this claim.

Conclusions

The claim has been submitted within two years of the effective date of Measure 37 (December 2, 2004), as extended by the 139 days enforcement of the Measure was suspended during the pendency of the *MacPherson v. DAS* appeal, based on land use regulations enacted or 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.” ORS 197.352(11)(C) defines “owner” as “the present owner of the property, or any interest therein.”

Findings of Fact

This claim involves three tax lots: tax 1201 in Section 27 and tax lots 100 and 200 in Section 33. This property was acquired by the claimant’s uncle, Coleman Wheeler, on March 9, 1959. On December 9, 1959, Mr. Wheeler and the claimant, Bruce M. Hall, entered into a business partnership under the name of “Willamette Farms.” An “Assumed Business Name Certificate” for the partnership dated December 9, 1959, has been submitted with the claim. The claimant has submitted an affidavit stating that the subject property was an asset of this partnership and asserting the nature of the interest in the subject property the partnership granted him. No written partnership agreement has been submitted with the claim. Mr. Wheeler died on October 10, 1973, and a settlement agreement regarding his estate, including the claimant’s interest in the assets of the partnership, was signed on October 2, 1975.² Deeds conveying some of the land assets of the partnership were signed on February 20, 1976, and recorded on March 12, 1976. Based on Yamhill County deed records, the claimant, Bruce Hall, is a current owner of the property. (See copies of deeds and other documents in department’s claim file).

Conclusions

The claimant, Bruce Hall, is an “owner” of the subject property as that term is defined by ORS 197.352(11)(C). Mr. Hall became an owner of an interest in the property on October 2, 1975, as a result of the settlement agreement between Mr. Hall and the estate of Mr. Wheeler. Prior to that time, based on the department’s record, Mr. Hall held no property interest in the land. The claimant’s uncle, Coleman Wheeler, is a “family member,” as defined by ORS 197.352(11)(A), who acquired an interest in the subject property on March 9, 1959.

² The decision regarding Mr. Hall’s Measure 37 claim to Yamhill County also determined that Mr. Hall became the current owner of the property on October 2, 1975, upon the settlement of Mr. Wheeler’s estate. (Yamhill County Board Order 05-453 dated June 15, 2005). Mr. Hall has filed a Writ of Review (No. CV 050248) in Yamhill County Circuit Court challenging the county’s decision.

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 indicates that "Sections 402.03(A) and 403" of the Yamhill County EF-80 zone, the "minimum lot size of 80 acres," the "\$80,000 in gross annual income" requirement for a principal dwelling and the Willamette River Greenway Overlay District are the basis for the claim.

The claim is based generally on Yamhill County's current EFU zone and the applicable provisions of state law that require such zoning. The claimant's property is zoned EFU as required by Goal 3, in accordance with ORS 215 and OAR 660, division 33, because the claimant's property is "agricultural land" as defined by Goal 3.³ Goal 3 became effective on January 25, 1975, and required that agricultural lands as defined by the Goal be zoned EFU pursuant to ORS 215.

Current land use regulations, particularly ORS 215.263, 215.284 and 215.780 and OAR 660, division 33, enacted or adopted pursuant to Goal 3, prohibit the division of EFU-zoned land into parcels less than 80 acres and establish standards for development of dwellings on existing or proposed parcels on that land.

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

ORS 215.263 (2005 edition) establishes standards for the creation of new parcels for non-farm uses and dwellings allowed in an EFU zone.

OAR 660-033-0135 (applicable to farm dwellings) became effective on March 1, 1994, and interprets the statutory standard for a primary dwelling in an EFU zone under ORS 215.283(1)(f). OAR 660-033-0130(4) (applicable to non-farm dwellings) became effective on August 7, 1993, and was amended to comply with ORS 215.284(4) on March 1, 1994. The Commission subsequently adopted amendments to comply with House Bill 3326 (Chapter 704, Oregon Laws 2001, effective on January 1, 2002), which were effective on May 22, 2002. (See administrative rule history for OAR 660-033-0100, -0130 and -0135.)

Goal 15 (Willamette River Greenway) was adopted on December 6, 1975, and became effective on December 24, 1975. Goal 15 generally protects the natural, scenic, historical, agricultural, economic and recreational qualities of lands within the Willamette River Greenway.

The claimant's family first acquired the subject property in 1959, prior to the adoption of the statewide planning goals and their implementing statutes and rules. No county zoning applied to the subject property in 1959.

³ The claimant's property is "agricultural land" because it contains Natural Resources Conservation Service Class I-IV soils.

Conclusions

The current zoning requirements, minimum lot size, dwelling standards and development restrictions established by applicable provisions of Goals 3 and 15, ORS 215 and OAR 660, division 33, were all enacted or adopted after the claimant's family acquired the subject property in 1959 and do not allow the desired division or residential development of the property. These laws restrict the use of the subject property relative to the uses allowed when the claimant's family acquired the 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 \$2,192,924 as the reduction in the subject property's fair market value due to current regulations. This amount reflects the claimant's estimate of the market value of the property if it could be divided into 12 to 14 homesites and is based on information provided by a local realtor. No appraisal or other documentation has been provided with the claim to support this statement.

Conclusions

As explained in Section V.(1) of this report, the claimant is Bruce Hall whose family members acquired the subject property in 1959. Under ORS 197.352, the claimant is due compensation for land use regulations that restrict the use of the property in a manner that reduces its fair market value. Based on the findings and conclusions in Section V.(2) of this report, laws enacted or adopted since the claimant's family acquired the subject property restrict the desired division and development of the property. The claimant estimates the reduction in value due to the restrictions to be \$2,192,924.

Without an appraisal or other documentation, it is not possible to substantiate the specific dollar amount the claimant demands for compensation. Nevertheless, based on the submitted information, the department determines that it is more likely than not that the fair market value of the subject property has been reduced to some extent as a result of land use regulations enforced by the Commission or the department since the claimant's family acquired 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.

Findings of Fact

The claim is based on state land use regulations that restrict the use of the subject property relative to the uses permitted when the claimant's family acquired the property, including

applicable provisions of Goals 3 and 15, ORS 215 and OAR 660, division 33, which Yamhill County has implemented through its current EFU zone and Willamette River Greenway Ordinance. All of these land use regulations were enacted or adopted after the claimant's family acquired the subject property.

Conclusions

It appears that none of the general statutory, goal and rule restrictions on residential division and development of the subject property were in effect when the claimant's family acquired the property on March 9, 1959. As a result, these laws are not exempt under ORS 197.352(3)(E). Laws in effect when the claimant's family acquired the subject property are exempt under ORS 197.352(3)(E), and do not provide a basis for compensation. In addition, other land use laws enacted or adopted for a purpose set forth in ORS 197.352(3)(A) to (D) are also exempt, and would not provide a basis for compensation.

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 laws that restrict the use of the subject 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 subject 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 of the department must provide only non-monetary relief unless and until funds are appropriated by the legislature to pay claims.

Findings of Fact

Based on the findings and conclusions set forth in this report, laws enforced by the Commission or the department restrict the claimant's ability to divide the 202-acre property into 12 to 14 parcels and to develop a dwelling on each parcel. The claim asserts that the laws enforced by the Commission or the department reduce the fair market value of the subject property by \$2,192,924. 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 subject 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 subject 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 Bruce Hall to use the subject property for a use permitted at the time he acquired the property on October 2, 1975.

The claimant acquired the subject property after the adoption of the statewide planning goals, but before the Commission acknowledged Yamhill County's land use regulations to be in compliance with the statewide planning goals pursuant to ORS 197.250 and 197.251. Because the Commission had not acknowledged the county's plan and land use regulations when the

claimant acquired the subject property on October 2, 1975, the statewide planning goals, and Goal 3 in particular, applied directly to the claimant's property when he acquired it.⁴

As adopted on January 25, 1975, Goal 3 required that agricultural land be preserved and zoned for EFU pursuant to ORS 215. The Goal 3 standard for land divisions involving property where the local zoning was not acknowledged required that the resulting parcels must be of a size that is "appropriate for the continuation of the existing commercial agricultural enterprise within the area." Further, ORS 215.263 (1973 edition) required that all divisions of land subject to EFU zoning comply with the legislative intent set forth in ORS 215.243 (Agricultural Land Use Policy). Thus, the claimant's opportunity to divide the subject property when he acquired it in 1975 was limited to land divisions that were consistent with Goal 3, which required that the resulting parcels be (1) appropriate for the continuation of the existing commercial agricultural enterprise in the area and (2) shown to comply with the legislative intent set forth in ORS 215.

Under the Goal 3 standards in effect on October 2, 1975, farm dwellings were allowed if they were determined to be "customarily provided in conjunction with farm use" under ORS 215.213(1)(e) (1973 edition). Non-farm dwellings were subject to compliance with ORS 215.213(3) (1973 edition).

No information has been presented in the claim to establish that the claimant's desired division of the subject property into 12 to 14 parcels complies with the "commercial" standard for farm parcels under Goal 3 or the standards for non-farm parcels under ORS 215.263 (1973 edition), nor is there any information to establish that the claimant's desired development of 12 to 14 dwellings on the subject property satisfies the standards for farm or non-farm dwellings under ORS 215.213 (1973 edition).

When the claimant acquired the subject property on October 2, 1975, Goal 15 had not yet been adopted.

This report addresses only those state laws that are identified in the claim, or that the department is certain apply to the subject property based on the uses that the claimant has identified. There may be other laws that currently apply to the claimant's use of the subject property, and that may continue to apply to the claimant's use of the property, that have not been identified in the claim. In some cases, it will not be possible to know which laws apply to a use of subject property until there is a specific proposal for that use. When the claimant seeks a building or development permit to carry out a specific use, it may become evident that other state laws apply to that use.

⁴ Most of the statewide planning goals became effective on January 25, 1975, and were applicable to legislative land use decisions and some quasi-judicial land use decisions prior to the Commission's acknowledgment of each county's comprehensive plan and implementing regulations. *Perkins v. City of Rajneeshpuram*, 300 Or 1 (1985); *Alexanderson v. Polk County*, 289 Or 427, rev. den 290 Or 137 (1980); *Sunnyside Neighborhood Assn. v. Clackamas County*, 280 Or 3 (1977); *Jurgenson v. Union County*, 42 Or App 505 (1979); and *1000 Friends of Oregon v. Benton County*, 32 Or App 413 (1978). After the county's plan and land use regulations were acknowledged by the Commission, the statewide planning goals and implementing rules no longer applied directly to such local land use decisions. *Byrd v. Stringer*, 295 Or 311 (1983). However, statutory requirements continue to apply, and insofar as the state and local provisions are materially the same, the local provisions must be interpreted consistent with the substance of the goals and implementing rules. *Forster v. Polk County*, 115 Or App 475 (1992) and *Kenagy v. Benton County*, 115 Or App 131 (1992).

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 Bruce Hall's division of the 202-acre property into 12 to 14 parcels or to his development of a dwelling on each parcel: applicable provisions of Goals 3 and 15, ORS 215 and OAR 660, division 33, enacted or adopted after October 2, 1975. These land use regulations will not apply to the claimant only to the extent necessary to allow him to use the subject property for the use described in this report, and only to the extent that use was permitted when he acquired the property on October 2, 1975.
2. The action by the State of Oregon provides the state's authorization to the claimant to use the subject property for the use described in this report, subject to the standards in effect on October 2, 1975. On that date, the property was subject to applicable provisions of Goal 3 and ORS 215 then in effect.
3. To the extent that any law, order, deed, agreement or other legally enforceable public or private requirement provides that the subject property may not be used without a permit, license or other form of authorization or consent, the order will not authorize the use of the property unless the claimant first obtains that permit, license or other form of authorization or consent. Such requirements may include, but are not limited to: a building permit, a land use decision, a "permit" as defined in ORS 215.402 or 227.160, other permits or authorizations from local, state or federal agencies and restrictions on the use of the subject property imposed by private parties.
4. Any use of the subject property by the claimant under the terms of the order will remain subject to the following laws: (a) those laws not specified in (1) above; (b) any laws enacted or enforced by a public entity other than the Commission or the department; and (c) those laws not subject to ORS 197.352 including, without limitation, those laws exempted under ORS 197.352(3).
5. Without limiting the generality of the foregoing terms and conditions, in order for the claimant to use the subject property, it may be necessary for him to obtain a decision under ORS 197.352 from a city and/or county and/or metropolitan service district that enforces land use regulations applicable to the property. Nothing in this order relieves the claimant from the necessity of obtaining a decision under ORS 197.352 from a local public entity that has jurisdiction to enforce a land use regulation applicable to a use of the subject property by the claimant.

VII. COMMENTS ON THE DRAFT STAFF REPORT

The department issued its draft staff report on this claim on March 23, 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.

**ORS 197.352 (2004 OREGON BALLOT MEASURE 37)
CLAIM FOR COMPENSATION**

OREGON WATER RESOURCES DEPARTMENT

Final Staff Report and Recommendation

April 11, 2006

STATE CLAIM NUMBER: M118537

NAME OF CLAIMANT: Bruce M. Hall

MAILING ADDRESS: 1454 SW Highland Rd
Portland, OR 97221

PROPERTY IDENTIFICATION: T3S, R2W, section 27, tax lot 1201 and
T3S, R2W, section 33, tax lots 101 & 200

DATE RECEIVED BY DAS: May 31, 2005

180-DAY DEADLINE: April 15, 2006¹

I. CLAIM

The claimant, Bruce M. Hall, seeks an unspecified amount of compensation for the reduction in fair market value as a result of Oregon Administrative Rule (OAR) Chapter 690, Division 9, Division 33 "and other rules of the commission." The property is located at 8000 NE Parrish Road, Newberg, OR in Yamhill County and is described as T3S, R2W, section 27 WM, tax lot 1201 and T3S, R2W, section 33 WM, tax lots 101 and 200. (See claim.)

II. SUMMARY OF STAFF RECOMMENDATION

Based on the preliminary findings and conclusions set forth below, the Water Resources Department (WRD) has determined that the claim is not valid as to laws administered by the department, and finds the claimant is not entitled to relief under ORS 197.352. Based on advice of counsel and department staff recommendations, this claim lacks evidence that WRD has enforced an existing law since December 2, 2004 to restrict the claimant's proposed use: to use of water from wells for irrigation. Based on this determination, WRD has not completed a full evaluation or determination on the merits or substance of the remainder of the elements necessary for it to approve a claim.

¹ In *MacPherson v. Dep't of Admin. Servs.*, ___ Or ___, 2006 Ore. LEXIS 104 (February 21, 2006), the Marion County trial court entered an order suspending all timelines under ORS 197.352. This order was in effect for a period of 139 days, extending the 180-day deadline under ORS 197.352(6) by that same period.

III. COMMENTS RECEIVED

Pursuant to OAR 125-145-0080, the Oregon Department of Administrative Services (DAS) provided written notice to the owners of surrounding properties as determined by DAS. According to DAS, comments from three (3) parties were received from the notice mailed. WRD has considered the comments in preparing this report.

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 for 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 31, 2005, for processing under OAR Chapter 125. The claim identifies OAR Chapter 690 Divisions 9 and 33, and "other rules of the commission" as used in the proposed final order for Water Right Application G-15287 as restrictions on the use of the property that are the basis for this portion of the claim. The phrase "other rules of the commission" as used in the proposed final order for Application G-15287 is a reference to OAR 690-033-0330. OAR Chapter 690 Divisions 9 and 33 were enacted prior to December 2, 2004, the effective date of ORS 197.353. (See citations of statutory and administrative rule history of the Oregon Revised Statutes and Oregon Administrative Rules.)

Conclusions

The claim was submitted within two years of December 2, 2004, based on state laws in effect 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 to "owners" as that term is defined in ORS 197.352(11)(C). Under that section, an "owner" is "the present owner of the property, or any interest therein."

Findings of Fact

OWRD by this reference incorporates the findings of fact concerning ownership in the draft staff report of the Department of Land Conservation and Development (DLCD) on claim M118537 (Hall).

Conclusions

The claimant, Bruce Hall, is an “owner” of the subject property as that term is defined by ORS 197.352(11)(C) of Measure 37. Mr. Hall became an owner of an interest in the property on October 2, 1975 as a result of the settlement agreement between Mr. Hall and the estate of Mr. Wheeler. Prior to that time, based on the Department’s record, Mr. Hall held no property interest in the land. The claimant’s uncle, Coleman Wheeler, is a “family member” as defined by ORS 197.352(11)(A) of Measure 37, who acquired an interest in the subject property on March 9, 1959.

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 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 claimants or a family member acquired the property.

Findings of Fact

The claimant states that enforcement of OAR 690 Divisions 9 and 33, resulted in denial of an application for use of water from two existing wells. The claimant asserts that this action adversely affected the land use on the property by limiting the amount of water available for farming. The claimant also states that the reduction in the value of the land is evidenced by the need to transfer water from claimant’s other water rights, which WRD authorized for temporary five-year periods, subject to renewal, and that “the temporary nature of the water supply...reduces the value of the property because there is no permanent water supply, and renewal of the right is not guaranteed.”

According to information in water right application file G-15287, the claimant submitted a water right application in January 2001 for 0.33 cubic feet per second (cfs) of water for irrigation of 26.4 acres from April 15 through October 31. In April, 2002, WRD issued a proposed final order (PFO) proposing to deny the application because the ground water use would have the potential for substantial interference with surface water in the Willamette Basin and the Willamette Basin Program does not allow irrigation from July1 through August 31. The claimant protested the PFO. A settlement agreement resolving the protest allowed irrigation from the wells described in the application except during the period from July1 through August 31 of each year and directed the claimant to irrigate by means of temporary transfers during that period. In May 2004, the claimant received a permit (G-15630) allowing the use 0.15 cfs of water for the irrigation of 26.4 acres for a period of use of March 1 through June 30 and September 1 through October 31.

The Oregon Water Code was enacted in 1909. Under this authority (ORS 536) the Water Resources Commission is obligated to adopt rules and standards to allow the orderly development of waters of the State and to protect senior water right holders. The Commission is further instructed to progressively formulate an integrated, coordinated program for the use and control of all the water resources of this state. Ground water is specifically managed under the 1955 Ground Water Act (ORS 537.505). The claimant has no right to use water except as provided under the terms of his existing water right and Oregon law. WRD has not taken any action to enforce a state law that restricts the claimant's use of water under permit G-15630, nor has the Department taken any action to enforce any law that restricts any other right claimant may have to use water on the Property.

The state administrative rules identified in the claim that are administered by WRD are not rules of the Land Conservation and Development Commission (LCDC), and are not administrative rules regulating farming and forest practices.

Conclusions

The claimant applied for and received a water right for the use of water on the Property. WRD has not taken any action since December 2, 2004 to enforce an existing state law that restricts the claimant's rights to the Property. As a result, the claimant has not demonstrated how his use of the property is restricted as the result of the enforcement of existing "land use regulations" administered by WRD relative to rights that he had when he acquired the property. Nor has the claimant demonstrated how WRD has enforced an existing "land use regulation" since December 2, 2004 with respect to his use of the property. The state administrative rules identified in the claim that are administered by WRD are not "land use regulations" as that term is defined in ORS 197.352(11). As a result, there is no basis upon which WRD may approve a claim under ORS 197.352.

3. Effect of Regulations on Fair Market Value

In order to establish a valid claim, ORS 197.352(1) requires, in part, 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

According to the claim, the fair market value of the property will be reduced by an "uncertain" amount because it does not have a permanent water supply. Additional information submitted on behalf of the claimant alleges that the value of the property will be diminished by 30 to 60 percent, with irrigated farmland in the area valued from \$8,000 to \$12,000 per acre while dryland is valued at \$5,000 to \$7,000 per acre.

The claimant appears to seek to carry out both residential development of the property and farm use (irrigation) of the property. The claim does not explain how both uses may occur on the same land.

Conclusions

The claim provides no evidence to demonstrate that the state has enforced a “land use regulation” in a manner that restricts the claimant’s use of the Property or has reduced its fair market value. The evidence provided assumes that the state prohibited the use of water on the property, something that the state has not done. To the contrary, the state has allowed the use of water on the Property by issuing Permit G-15630. As a result, there is no evidence in the record for this claim that the fair market value of the Property has been reduced by a law that WRD has enforced since December 2, 2004 (the effective date of ORS 197.352).

4. Exemptions under section 3 of Ballot Measure 37

ORS 197.352 does not apply to certain land use regulations. In addition, under ORS 197.352(3), certain types of laws are exempt. WRD has not analyzed whether any of the exemptions under the Measure may apply to this claim, because it has determined that there is no restriction on use, and no reduction in value.

VI. FORM OF RELIEF

ORS 197.352(1) requires payment of compensation to an owner of private real property if the department has enacted or enforced a law that restricts the use of the property in a manner that reduces its fair market value. Because of the lack of evidence that an existing law has been enforced since December 2, 2004, in a manner that restricted the claimant’s use of the property and has reduced the fair market value of the property, WRD did not make further evaluations or determination on the merits or substance of the claim.

Conclusions

No showing has been made that WRD has enforced an existing law since December 2, 2004 to restrict an existing right of the claimant. As a result, WRD must deny this claim.