

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. M118561
(BALLOT MEASURE 37) OF)
Delbert Hoekstre, CLAIMANT)

Claimant: Delbert Hoekstre (the Claimant)

Property: Tax lot 400, Township 6S, Range 6W, Section 36
16790 Highway 22, Dallas, Oregon 97338, Polk County
Tax Lot 200, Township 7S, Range 5W, Section 5,
15010 Highway 22, Dallas, Oregon 97338 Polk 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) 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 Mr. Hoekstre's division of tax lot 400 into three, approximately 4-acre lots, and the division of tax lot 200 into 20, approximately 5-acre parcels, or to the development of a dwelling on each vacant parcel: applicable provisions of Goals 3 and 4, ORS 215 and OAR 660, divisions 6 and 33. These land use regulations will not apply to the claimant's property only to the extent necessary to allow him to use the property for the use described in this report, and only to the extent that use was permitted when he acquired the property on March 4, 1970.
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 March 4, 1970.

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 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 property imposed by private parties.

4. Any use of the 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 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 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.

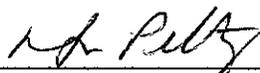
FOR DLCD AND THE LAND CONSERVATION
AND DEVELOPMENT COMMISSION:
Lane Shetterly, Director



George Naughton, Deputy Director
DLCD

Dated this 14th day of April, 2006.

FOR the DEPARTMENT OF ADMINISTRATIVE
SERVICES:



Dugan Petty, Deputy Administrator
DAS, State Services Division
Dated this 14th 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 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.

ORS 197.352 (BALLOT MEASURE 37) CLAIM FOR COMPENSATION

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

April 14, 2006

STATE CLAIM NUMBER: M118561

NAME OF CLAIMANT Delbert Hoekstre

MAILING ADDRESS: 15010 Highway 22
Dallas, Oregon 97338

PROPERTY IDENTIFICATION: Township 6S, Range 6W, Section 36
Tax lot 400
Polk County
16790 Highway 22
Dallas, Oregon 97338

Township 7S, Range 5W, Section 5,
Tax Lot 200
Polk County
15010 Highway 22
Dallas, Oregon 97338

DATE RECEIVED BY DAS: June 6, 2005

180-DAY DEADLINE: April 21, 2006¹

I. SUMMARY OF CLAIM

The claimant, Delbert Hoekstre, seeks compensation in the amount of \$2,864,500 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.² The claimant desires compensation or the right to divide a 12.75-acre property (tax lot 400) into three, approximately 4-acre parcels and a 99.22-acre property (tax lot 200) into 20, approximately 5-acre parcels, and to develop a dwelling on each

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).

² This claim consists of two separate tax lots and a separate claim form for each tax lot filed simultaneously with the Department of Administrative services (DAS). For the purposes of this report, claims for these two tax lots have been combined.

vacant parcel.³ The two tax lots subject to this claim are located at 15010 and 16790 Highway 22, near the City of Dallas. (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 Mr. Hoekstre's division of the 12.75 acre property (tax lot 400) into three, approximately 4-acre parcels, and division of the 99.22-acre property (tax lot 200) into 20, approximately 5-acre parcels and to his development of a dwelling on each vacant parcel: applicable provisions of Statewide Planning Goals 3 (Agricultural Lands) and 4 (Forest Lands), ORS 215 and Oregon Administrative Rules (OAR) 660, divisions 6 and 33. These laws will not apply to the claimant only to the extent necessary to allow him to use the subject property for a use described in this report, and only to the extent that use was permitted at the time he acquired the property on March 4, 1970. (See the complete recommendation in Section VI. of this report.)

III. COMMENTS ON THE CLAIM

Comments Received

On March 2, 2005, pursuant to OAR 125-145-0080, the Oregon Department of Administrative Services (DAS) provided written notice to the owners of surrounding properties. According to DAS, one letter containing written comments, evidence or information was received in response to the 10-day notice.⁴

The comments are relevant to when the claimant became the present owner of the property, whether a state law restricts the use of the property and whether the restriction of the claimant's use of the property reduces the fair market value of the property. The comments have been considered by the department in preparing this report.

³ A Polk County Community Development Department memorandum regarding a county claim for the subject property indicates the claimant desires to divide tax lot 400 into three 4-acre parcels, and tax lot 200 into twenty 5-acre parcels, and to develop a residential dwelling on each vacant parcel. The claim filed with the state does not specify the number or size of the desired parcels. However, the state claim does include an estimate for loss of fair market value equivalent to the estimate filed with the Polk County claim. Based on this information, the department concludes the claimant seeks the same use as sought in the county claim.

⁴ The department also received copies of reports issued by the Polk County Community Development Department, including notices to surrounding property owners, and a letter of comment to the county.

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), 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 June 6, 2005, for processing under OAR 125, division 145. The claim identifies several Polk County ordinances as the basis for the claim. Only laws that were enacted or adopted prior to December 2, 2004, the effective date of Measure 37, are the basis for this claim. (See citations of statutory and administrative rule history of the ORS and OAR.)

Conclusions

The claim has been submitted within two years of the effective date of Measure 37 (December 2, 2004), as 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" as that term is defined in the 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 claimant, Delbert Hoekstre, acquired the subject property on March 4, 1970, as reflected by a warranty deed included with the claim.⁵ The warranty deed also lists Wordell E. Hoekstre,

⁵ The claim appears to assert that the claimant's family acquired tax lot 400 on September 21, 1965. However the claim includes no documentation to substantiate a 1965 family acquisition date.

wife of the claimant, as an owner of these tax lots.⁶ The Polk County Assessor's Office confirms that the claimant is the current owner of the subject property.

Conclusions

The claimant, Delbert Hoekstre, is an "owner" of the subject property as that term is defined by ORS 197.352(11)(C) as of March 4, 1970.

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 the claimant desires to divide subject property comprising two tax lots into 4 and 5-acre parcels, and to develop each parcel with a dwelling, which is prohibited under Polk County's land use ordinances.

The claim is based generally on Polk County's current FF and EFU zones, and the provisions of state law that require such zoning. The claimant's tax lot 400 is zoned FF, which is a mixed agricultural and forest land zone adopted to comply with Goal 4 and provisions of OAR 660-006-0050 (effective on February 5, 1990), which were subsequently amended on March 1, 1994, to comply with House Bill (HB) 3661 (Chapter 792, Oregon Laws 1993). Tax lot 200 is zoned Exclusive Farm Use (EFU) as required by Goal 3, in accordance with ORS 215 and OAR 660, division 33, because tax lot 200 is "agricultural land" as defined by Goal 3.⁷ Goal 3 became effective on January 25, 1975, and required that agricultural lands as defined by the Goal be EFU zoned pursuant to ORS 215.

For FF-zoned tax lot 400, under OAR 660-006-0050, all the uses permitted under Goals 3 and 4 are allowed in mixed agriculture and forest zones except that, for dwellings, either the Goal 3 or 4 standards are applicable based on the predominant use of the tract on January 1, 1993. Information provided in the Polk County Community Development Department memorandum in response to the local claim filed with the county regarding tax lot 400 indicates that the predominant use of the property is forestry "based on tax records." As such, the property is subject to the dwelling standards required by Goal 4 and OAR 660, division 6.

For land divisions, OAR 660-006-0055 authorizes the creation of new parcels based on the standards applicable to farm or forest zones that implement the 80-acre minimum lot size specified in ORS 215.780, unless a smaller minimum lot size is approved by the Commission. In

⁶ There is nothing in the record to indicate that Wordell Hoekstre is a claimant for the purposes of this Measure 37 claim.

⁷ The claimant's tax lot 200 is "agricultural land" because it contains Natural Resources Conservation Service Class I-IV soils.

this instance, under ORS 215.780(2)(a), the minimum lot size in Polk County's FF zone is 40 acres. Accordingly, tax lot 400 cannot be divided into parcels smaller than 40 acres.

For EFU-zoned tax lot 200, current state 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 HB 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.)

The claimant acquired the subject property on March 4, 1970, prior to the adoption of statewide planning goals and their implementing statutes and regulations.

Conclusions

For tax lot 400, the current zoning requirements, minimum lot size and dwelling standards established under Goal 4 for lands zoned for mixed farm-forest use and the statutory and rule restrictions under applicable provisions of ORS 215 and OAR 660, division 6, were enacted or adopted after the claimant acquired the subject property in 1970 and restrict the use of the property relative to uses allowed when the claimant acquired the property.

For tax lot 200, the current zoning requirements, minimum lot size and dwelling standards established in response to amendments to Goal 3, ORS 215 and OAR 660, division 33, were all enacted or adopted after the claimant acquired the subject property in 1970 and do not allow the desired division and development of the property for residential use. These laws restrict use of the property relative to the uses allowed when the claimant 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 desired uses that the claimant has identified. There may be other laws that currently apply to the claimant's use of the 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 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.

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 \$374,500 as the reduction in fair market value of tax lot 400 and \$2,490,000 as the reduction in fair market value for lot 200 as a result of current regulations. The claim states that the estimate for tax lot 400 is based on “\$500 purchase price [and] comp[arative] real estate values [of] 4-acre building sites [at] \$125,000 [each].” The claim does not indicate a basis for the estimated reduction in fair market value for tax lot 200.

Conclusions

As explained in section V. (1) of this report, the claimant is Delbert Hoekstre who acquired the subject property on March 4, 1970. Under ORS 197.352, the claimant is 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 enacted or adopted since the claimant acquired the subject property restrict the desired division and residential development of the property. The claimant estimates the combined reduction in value of the subject property due to the restrictions to be \$2,864,500.

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.

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 state land use regulations that restrict the use of the subject property, including applicable provisions of Goals 3 and 4, ORS 215 and OAR 660, divisions 6 and 33. All of these land use regulations were enacted or adopted after the claimant acquired the subject property.

Conclusions

Without a specific development proposal for the subject 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 appears that none of the general statutory, goal and rule restrictions on division and development of the subject property were in effect when the claimant acquired the property in 1970. As a result, these laws are not exempt under ORS 197.352(3)(E). The department notes that ORS 215.730 and OAR 660, division 6, include standards for siting dwellings in forest zones. The provisions include fire protection standards for dwellings. 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. . . ." To the extent they are applicable to the claimant's property, siting standards for dwellings in forest zones in ORS 215.730 and OAR 660, division 6, are exempt under ORS 197.352(3).

Laws in effect when the claimant acquired the subject property are exempt under ORS 197.352(3)(E), and will continue to apply to the claimant's use of the property. There may be other laws that continue to apply to the claimant's use of the subject 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 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. 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 subject property based on the uses that the claimant has 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 claimant should be aware that the less information he has provided to the department in his claim, the greater the possibility that there may be additional laws that will later be determined to continue to apply to his 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 laws that restrict 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 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 tax lot 400 into three, approximately 4-acre parcels, and tax lot 200 into 20, approximately 5-acre parcels, and to develop a dwelling on each parcel. The claim asserts that the laws enforced by the Commission or the department reduce the combined fair market value of the subject property by \$2,864,500. 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 Delbert Hoekstre to use the subject property for a use permitted at the time he acquired the subject property on March 4, 1970.

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 Mr. Hoekstre's division of tax lot 400 into three, approximately 4-acre lots, and the division of tax lot 200 into 20, approximately 5-acre parcels, or to the development of a dwelling on each vacant parcel: applicable provisions of Goals 3 and 4, ORS 215 and OAR 660, divisions 6 and 33. These land use regulations will not apply to the claimant's property only to the extent necessary to allow him to use the property for the use described in this report, and only to the extent that use was permitted when he acquired the property on March 4, 1970.
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 March 4, 1970.
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 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 property imposed by private parties.
4. Any use of the 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 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 property by the claimant.

VII. COMMENTS ON THE DRAFT STAFF REPORT

The department issued its draft staff report on this claim on March 28, 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.