

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. M118575
(BALLOT MEASURE 37) OF)
Chelsea Trees Inc., CLAIMANT)

Claimant: Chelsea Trees Inc. (the Claimant)

Property: Tax lot 303, Township 18, Range 10, Section 2, Deschutes 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 Chelsea Trees Inc.'s establishment of a single-family dwelling on the subject property: applicable provisions of Goals 4 and 5, ORS 215, and OAR 660, divisions 6, 16 and 23, enacted or adopted after June 10, 1988. These land use regulations will not apply to use of the subject property only to the extent necessary to allow the claimant a use permitted at the time it acquired the property on June 10, 1988. At that time, the property was subject to Deschutes County's acknowledged F-2/LM zone then in effect.
2. The action by the State of Oregon provides the state's authorization to the claimant to use the property subject to the standards in effect on June 10, 1988. On that date, the property was subject to applicable provisions of Goals 4 and 5, ORS 215 and OAR 660, divisions 6 and 16, 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 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 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 claimant to use the property, it may be necessary for the claimant 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:

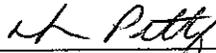
Lane Shetterly, Director



George Naughton, Deputy Director
DLCD

Dated this 18th day of April, 2006.

FOR the DEPARTMENT OF ADMINISTRATIVE
SERVICES:



Dugan Petty, Deputy Administrator
DAS, State Services Division

Dated this 18th 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 18, 2006

STATE CLAIM NUMBER: M118575

NAME OF CLAIMANT: Chelsea Trees Inc.

MAILING ADDRESS: PO Box 11
Bend, Oregon 97709

PROPERTY IDENTIFICATION: Township 18, Range 10, Section 2
Tax lot 303
Deschutes County

OTHER CONTACT INFORMATION: Bruce W. White
PO Box 1278
Bend, Oregon 97709

OTHER INTEREST IN PROPERTY: City of Bend¹
710 Northwest Wall Street
Bend, Oregon 97701

PacifiCorp²
825 Northeast Multnomah
Portland, Oregon 97232

Deschutes County³
1300 Northwest Wall Street
Bend, Oregon 97701

DATE RECEIVED BY DAS: June 9, 2005

180-DAY DEADLINE: April 24, 2006⁴

¹ Two easements.

² Two easements.

³ Conservation easement.

⁴ This date reflects 180 days from the date the claim was submitted as extended by the 139 days enforcement of 2005 Oregon Laws, Chapter 1 was suspended during the pendency of the appeal of *MacPherson v. DAS*. *MacPherson v. Dept. of Admin. Svcs.*, 340 Or 117 (2006).

I. SUMMARY OF CLAIM

The claimant, Chelsea Trees Inc., seeks compensation in the amount of \$400,000 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 develop a single-family dwelling and associated outbuildings on the subject property.⁵ The subject property is located at 16661 Skyliners Road, near the City of Bend, in Deschutes 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 Chelsea Trees' development of the property with a single-family dwelling and associated outbuildings: applicable provisions of Statewide Planning Goals 4 (Forest Land) and 5 (Natural Resources, Scenic and Historic Areas and Open Spaces), ORS 215 and Oregon Administrative Rules (OAR) 660, divisions 6, 16 and 23, enacted or adopted after June 10, 1988. These laws will not apply to the claimant only to the extent necessary to allow Chelsea Trees Inc. use of the subject property for the use described in this report, and only to the extent that use was permitted at the time it acquired the property in 1988. (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, three written comments were received in response to the 10-day notice.

The comments do not address whether the claim meets the criteria for relief (compensation or waiver) under ORS 197.352. 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 waive a state law. (See comment letter in the department's claim file.)

⁵ The claimant has also requested that the department not apply (waive) certain laws as set forth in this report be transferable with the property. Under OAR 660-002-0010(8), the department may "not apply" a statute, rule or goal that is the basis for a claim. ORS 197.352 authorizes a state agency to not apply a law only to allow the owner a use of the property permitted at the time the owner acquired the property.

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, 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 9, 2005, for processing under OAR 125, division 145. The claim identifies Goals 4 and 5, provisions of ORS 215 and OAR 660, division 6, as laws that restrict the use of the property and 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), 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 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, Chelsea Trees Inc., acquired the subject property on June 10, 1988, as reflected by a warranty deed included with the claim. A copy of a title report dated May 26, 2005, indicates that Chelsea Trees Inc. is the current owner of the subject property.

Conclusions

The claimant, Chelsea Trees Inc., is an “owner” of the subject property, as that term is defined by ORS 197.352(11)(C), as of June 10, 1988.

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 states that the claimant desires to develop the subject property with a single-family dwelling, which is prohibited under the current state and local land use regulations applicable to the property.

The claim is based generally on Deschutes County's current F-2/LM zone and the applicable provisions of state law that require such zoning. The F-2 zone implements Goals 4 and 5 for riparian corridors, sets standards for the siting of dwellings in forest lands and provides for a 100-foot setback from streams. The LM zone is an overlay zone that implements Goal 5 for scenic resources.

The claimant's property is zoned F-2, as required by Goal 4 in accordance with ORS 215 and OAR 660, division 6, because the claimant's property is "forest land" under Goal 4. Goal 4 became effective on January 25, 1975, and required that forest land be zoned for forest use (see statutory and rule history under OAR 660-015-0000(4)). (The forest land administrative rules (OAR 660, division 6) became effective on September 1, 1982, and ORS 215.705 to 215.755 and 215.780 became effective on November 4, 1993 (Chapter 792, Oregon Laws 1993). OAR 660-006-0026 and 660-006-0027 were amended on March 1, 1994, to implement those statutes (see citations to rule history under OAR 660-015-0000(4)).

Goal 5 and implementing administrative rules provide direction to cities and counties for the protection of certain defined resources and sites. Goal 5 became effective on January 1, 1975, and was amended with effective dates of March 31, 1988, and August 30, 1996. OAR 660, division 16, implemented Goal 5 and was effective on June 29, 1981, and amended on June 6, 1990. Relevant portions of OAR 660, division 16, were replaced by OAR 660, division 23, which became effective on August 30, 1996. Goal 5 may, through the application of a local Goal 5 resource protection ordinance, affect land use on private property. OAR 660, divisions 16 and 23, provide guidance to local government for the implementation of Goal 5. OAR 660, division 16, became effective on May 8, 1981, and OAR 660, division 23, became effective on September 1, 1996. The local ordinances implementing Goal 5 were adopted in compliance with OAR 660, division 16. Deschutes County's current LM zone sets standards for development within the zone, including a 100-foot setback from the edge of designated roadways and from the mean high water mark of designated streams.⁶

⁶ The claimant cites a Goal 5 inventory map adopted by the county in 1992 (Deschutes County Code (DCC) 18.40.30(Y)), which the claimant asserts "expand the scope of fill and removal protections in a manner that . . . would preclude siting of a dwelling and associated outbuildings between Skyliners Road and Tumalo Creek." DCC 18.40.30(Y) requires a conditional use permit for the fill or removal of material from the bed or banks of a stream or wetland.

At the time the claimant acquired the subject property on June 10, 1988, it was subject to the county's acknowledged F-2/LM zone under an earlier edition of those zones. At that time, the F-2 zone (DCC 4.070) provided for dwellings in conjunction with forest use as an outright use and included a 100-foot setback from the high water mark of streams. In July 1988, the LM zone (DCC 4.180) set standards for development within the zone and referred to the setbacks in the underlying F-2 zone.

Conclusions

Amendments to the dwelling standards established by Goal 4, resource protections of Goal 5 and provisions applicable to land zoned for forest use in ORS 215.720 to 215.750 and OAR 660-006-0027 through -0029 were all enacted or adopted after Chelsea Trees Inc. acquired the subject property in July 1988, and therefore restrict the use of the property relative to the uses allowed when the property was acquired by Chelsea Trees Inc. on June 10, 1988. In 1988, the property was subject to the requirements of the county's acknowledged F-2/LM zone in effect at that time, which was adopted pursuant to Goals 4 and 5 and the provisions of ORS 215 and OAR 660, division 16, then in effect. The claim does not establish whether or to what extent the claimant's desired use of the property was permitted when the claimant acquired the property in 1988.

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 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 \$400,000 as the reduction in the subject property's fair market value as a result of current regulations. This estimate is based on the claimant's analysis of a 2000 appraisal, which showed the value of the property developed with a single-family residence, minus the value of timber and the land, subject to current regulations.

Conclusions

As explained in Section V.1 of this report, the claimant is Chelsea Trees Inc., which acquired the subject property on June 10, 1988. Under ORS 197.352, Chelsea Trees Inc. 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 property restrict development of the subject property. The claimant estimates the reduction in value due to the restrictions to be \$400,000.

Without further investigation and documentation and without verification of whether or the extent to which the claimant's desired use of the property was allowed under the standards in effect when the claimant acquired the property, it is not possible to substantiate the specific dollar amount the claimant demands for compensation. Nevertheless, based on the information in the claim, 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 state land use regulations that restrict the use of the subject property, including applicable provisions of Goals 4 and 5, ORS 215 and OAR 660, divisions 6 and 16, which Deschutes County has implemented through its F-2/LM zone. With the exception of provisions of Goals 4 and 5, ORS 215 and OAR 660, divisions 6 and 16, in effect on June 10, 1988, these laws were enacted or adopted after the claimant acquired the 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 the general statutory, goal and rule restrictions on residential development and use of the subject property are not exempt under ORS 197.352(3)(E) to the extent they were enacted or adopted after the claimant acquired the subject property. Provisions of Goals 4 and 5, ORS 215 and OAR 660, divisions 6 and 16, in effect when the claimant acquired the property in 1988 are exempt under ORS 197.352(3)(E) and will continue to apply to the property.

Other laws in effect when the claimant acquired the property are exempt under ORS 197.352(3)(E), and will continue to apply to the claimant's use of the property. In addition, the department notes that ORS 215.730 and OAR 660, division 6, include standards for siting dwellings in forest zones. These provisions include fire protection standards for dwellings and for surrounding forests. In particular OAR 660-006-0035 includes fire siting standards for dwellings and structures. 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, these siting standards for dwellings in forest zones in ORS 215.730 and OAR 660, division 6, are exempt under ORS 197.352(3).

There may be other laws that 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. In some cases, some of these laws may be exempt under ORS 197.352(3)(A) to 3(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 it has provided to the department in its claim, the greater the possibility that there may be additional laws that will later be determined to continue to apply to its use of the subject property.

VI. FORM OF RELIEF

ORS 197.352(1) provides for payment of compensation to an owner of private real property if the Commission or the department has enforced a law that restricts the use of the property in a manner that reduces its fair market value. In lieu of compensation, the department may choose to not apply the law in order to allow the present owner to carry out a use of the property permitted at the time the current owner acquired the property. The Commission, by rule, has directed that if the department determines a claim is valid, the Director 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 develop a single-family dwelling on the subject property. The claim asserts the laws enforced by the Commission or department reduce the fair market value of the subject property by \$400,000. Without further investigation and documentation and without verification of whether or the extent to which the claimant's desired use of the property was allowed under the standards in effect when the claimant acquired 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 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 Chelsea Trees Inc. to use the subject property for a use permitted at the time it acquired the property on June 10, 1988.

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 Chelsea Trees Inc.'s establishment of a single-family dwelling on the subject property: applicable provisions of Goals 4 and 5, ORS 215, and OAR 660, divisions 6, 16 and 23, enacted or adopted after June 10, 1988. These land use regulations will not apply to use of the subject

property only to the extent necessary to allow the claimant a use permitted at the time it acquired the property on June 10, 1988. At that time, the property was subject to Deschutes County's acknowledged F-2/LM zone then in effect.

2. The action by the State of Oregon provides the state's authorization to the claimant to use the property subject to the standards in effect on June 10, 1988. On that date, the property was subject to applicable provisions of Goals 4 and 5, ORS 215 and OAR 660, divisions 6 and 16, 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 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 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 claimant to use the property, it may be necessary for the claimant 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 30, 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.