

BEFORE THE DEPARTMENT OF ADMINISTRATIVE SERVICES,
THE DEPARTMENT OF LAND CONSERVATION AND DEVELOPMENT,
THE BOARD AND DEPARTMENT OF FORESTRY,
DEPARTMENT OF WATER RESOURCES, AND
THE DEPARTMENT OF ENVIRONMENTAL QUALITY
OF THE STATE OF OREGON

IN THE MATTER OF THE CLAIM FOR) FINAL ORDER
COMPENSATION UNDER ORS 197.352) CLAIM NO. M118600
(BALLOT MEASURE 37) OF)
Gary L. Guthrie, CLAIMANT)

Claimant: Gary L. Guthrie (the Claimant)

Property: Township 3S, Range 3W, Section 25, Tax lot 2100
Township 3S, Range 3W, Section 25, Tax lot 2600
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), the Oregon Water Resources Department (the WRD Report), the Oregon Department of Forestry (the ODF Report), and the Department of Environmental Quality (the DEQ Report), attached to and by this reference incorporated into this order.

ORDER

The Claim is denied as to laws administered by the Oregon Department of Forestry or the Oregon Board of Forestry, for the reasons set forth in the ODF Report.

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

The Claim is denied as to the laws administered by the Department of Environmental Quality for the reasons set forth in the DEQ 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 Gary L. Guthrie's partition of the 2.5-acre property and the 23.6-acre property into approximately 30 lots for residential development: applicable provisions of Goal 14 and

OAR 660-004-0040. 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 June 21, 1968.

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 June 21, 1968.

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

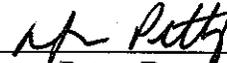
This Order is entered by the Oregon Board and Department of Forestry as a final order of the Board under ORS 197.352, OAR 629-001-0057, and OAR Chapter 125, division 145.

FOR DLCD AND THE LAND
CONSERVATION AND DEVELOPMENT
COMMISSION:



Lane Shetterly, Director
DLCD
Dated this 27th day of April, 2006.

FOR THE DEPARTMENT OF
ADMINISTRATIVE SERVICES:



Dugan Petty, Deputy Administrator
DAS, State Services Division
Dated this 27th day of April, 2006.

FOR THE OREGON WATER RESOURCES
DEPARTMENT



Phillip C. Ward, Director
Water Resources Department
Dated this 27th day of April, 2006

FOR THE OREGON BOARD OF
FORESTRY AND THE OREGON
DEPARTMENT OF FORESTRY:



Marvin Brown, State Forester
ODF
Dated this 27th day of April, 2006.

FOR THE FOR DEPARTMENT OF
ENVIRONMENTAL QUALITY

Paul Slyman, Deputy Director
DEQ
Dated this 27th day of April, 2006

NOTICE OF RIGHT TO APPEAL OR OTHER JUDICIAL RELIEF

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

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

FOR DLCD AND THE LAND
CONSERVATION AND DEVELOPMENT
COMMISSION:

Lane Shetterly, Director
DLCD
Dated this 27th day of April, 2006.

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Dugan Petty, Deputy Administrator
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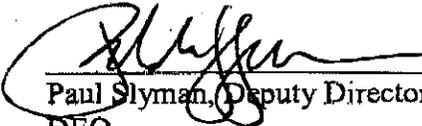
FOR THE OREGON WATER RESOURCES
DEPARTMENT

Phillip C. Ward, Director
Water Resources Department
Dated this 27th day of April, 2006

FOR THE OREGON BOARD OF
FORESTRY AND THE OREGON
DEPARTMENT OF FORESTRY:

Marvin Brown, State Forester
ODF
Dated this 27th day of April, 2006.

FOR THE FOR DEPARTMENT OF
ENVIRONMENTAL QUALITY



Paul Slyman, Deputy Director
DEQ
Dated this 27th day of April, 2006

NOTICE OF RIGHT TO APPEAL OR OTHER JUDICIAL RELIEF

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

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 27, 2006

STATE CLAIM NUMBER: M118600

NAME OF CLAIMANT: Gary L. Guthrie

MAILING ADDRESS: 23230 Northeast Hagey
Dundee, Oregon 97115

PROPERTY IDENTIFICATION: Township 3S, Range 3W, Section 25
Tax lot 2100

Township 3S, Range 3W, Section 25
Tax lot 2600
Yamhill County

OTHER CONTACT INFORMATION: Mark P. O'Donnell
1706 Northwest Glisan Street, Suite 6
Portland, Oregon 97209

DATE RECEIVED BY DAS: June 14, 2005

180-DAY DEADLINE: April 29, 2006¹

I. SUMMARY OF CLAIM

The claimant, Gary L. Guthrie, seeks compensation in the amount of \$1,080,000 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 divide the 2.5-acre property and the 23.6-acre property into approximately 30 lots for residential development. The subject property is located at 23230 Northeast Hagey, near Dundee, 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

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).

by the Land Conservation and Development Commission (the Commission) or the department not apply to Gary L. Guthrie's partition of the 2.5-acre property and the 23.6-acre property into approximately 30 lots for residential development: applicable provisions of Statewide Planning Goal 14 (Urbanization) and Oregon Administrative Rules (OAR) 660-004-0040. 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 in 1968. (See the complete recommendation in Section VI. of this report.)

III. COMMENTS ON THE CLAIM

Comments Received

On July 8, 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 written comment, evidence or information was received in response to the 10-day notice.

The comment does 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. (See the comment letter 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 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 14, 2005, for processing under OAR 125, division 145. The claim identifies Yamhill County zoning and ORS 92, 197, 215, 227, 454, 526, 527 and 536 and certain existing state administrative rules 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 the statute. ORS 197.352 (11)(C) defines “owner” as “the present owner of the property, or any interest therein.”

Findings of Fact

The claimant, Gary L. Guthrie, acquired the subject property on June 21, 1968, as reflected by a contract and warranty deed included with the claim. The subject property was conveyed to the Gary L. Guthrie Trust, which appears to be a revocable trust, with Gary L. Guthrie as trustee on December 2, 1998.² An April 28, 2005, Lot Book Service Report submitted with the claim establishes the claimant’s current ownership.

Conclusions

The claimant, Gary L. Guthrie, is an “owner” of the subject property as that term is defined by ORS 197.352 (11)(C) as of June 21, 1968.

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 the claimant’s objective is “all permitted uses except farm uses, including, but not limited to 30 parcel division.” The claim identifies Yamhill County zoning and certain statutes within ORS 92, 197, 215, 227, 454, 526, 527 and 536 and certain state administrative rules as laws that restrict the claimant’s use of the property.³

The claim summarily lists certain statutes contained in ORS 92, 197, 215 and 227 and OAR 660 as limiting the use of the property, with no description of why or how these laws restrict the claimant’s desired use. ORS 92 establishes procedures for subdivisions and partitions and, to the

² Transfer of the property to a revocable trust does not result in a change in ownership for purposes of ORS 197.352.

³ ORS 454 (sewage treatment and disposal systems), ORS 526 and 527 (forest practices) and ORS 536 (water resources administration) are not administered by the department and are not addressed in this report.

extent that it may restrict the claimant's use of the property, the operative provisions of the statutes were in effect in 1968. The claimant has not described or established that the current versions of the listed statutes are more restrictive than those in effect in 1968.

ORS 197 establishes procedures for comprehensive land use planning, and the claimant has not described or established how the listed statutes restrict the claimant's desired use of the property.

ORS 215 establishes procedures for county planning and zoning. The statutes authorizing county zoning predate 1968. The statutes addressing uses of land zoned for exclusive farm use do not apply to this property. The claimant has not described or established how the listed statutes restrict the claimant's desired use of the property.

ORS 227 establishes procedures for city planning and zoning. To the extent that this statute applies to this property, its operative provisions were in effect in 1968. The claimant has not described or established how the listed statutes restrict the claimant's desired use of the property.

The claim also lists a large number of state administrative rules administered by the department in OAR 660, including Goals 1 to 14. The claimant has not described or established how any of the listed rules restrict the claimant's desired use of the property. With the exception of Goal 14, and the administrative rule relating to rural residential housing that implements Goal 14, the department is unable to determine whether any of the listed statutes or rules apply to the claimant's desired use of the property.

Absent any evidence from the claimant as to how these statutes restrict the use of the property resulting in a reduction in its fair market value, these statutes are not addressed further in this report.

The claim is based generally on Yamhill County's current Very Low Density Residential District 2.5 (VLDR-2.5) zone and the applicable provisions of state law that require such zoning. The county's VLDR-2.5 zone is a rural residential zone as required by Goal 14, which generally requires that land outside of urban growth boundaries be used for rural uses.

Goal 14 was effective on January 25, 1975, and requires that local comprehensive plans identify and separate urbanizable land from rural land in order to provide for an orderly and efficient transition from rural to urban land use. In 2000, as a result of a 1986 Oregon Supreme Court decision,⁴ the Commission amended Goal 14 and adopted OAR 660-004-0040 (Application of Goal 14 to Rural Residential Areas), which was effective on October 4, 2000. The rule establishes minimum acreage standards for approval of new lots or parcels in rural residential zones, depending on the location and the local rural residential designation of the property at issue.

The rule states that if a county rural residential zone in effect on October 4, 2000, specifies a minimum lot size of two acres or more, the area of any new lot or parcel shall equal or exceed the minimum lot size that is already in effect (OAR 660-004-0040(7)(c)). Some relief from this provision is available for lots or parcels having more than one permanent habitable dwelling pursuant to OAR 660-004-0040(7)(h). The rule also provides that a

⁴ *1000 Friends of Oregon v. LCDC (Curry County)*, 301 Or 447 (1986).

county minimum lot size requirement in a rural residential zone shall not be amended to allow a smaller minimum lot size without approval of an exception to Goal 14 (OAR 660-004-0040(6)). Because Yamhill County's rural residential zone was in effect on October 4, 2000, and requires a minimum lot size of 2.5 acres, the minimum lot size for any new lot or parcel must equal or exceed 2.5 acres.

The claimant acquired the subject property in 1968, prior to the adoption of the statewide planning goals and their implementing statutes and rules. At that time, zoning laws did not apply to the property.

Conclusions

The minimum lot size requirements for rural residential lots or parcels established by Goal 14 and OAR 660-004-0040, were adopted since the claimant acquired the subject property in 1968 and do not allow the desired division of the property.

This report addresses only those state laws that are identified in the claim and 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.

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 \$1,080,000 as the reduction in the subject property's fair market value due to current regulations. This amount is based on an estimate of market values.

Conclusions

As explained in Section V.(1) of this report, the claimant is Gary L. Guthrie who acquired the subject property on June 21, 1968. 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 of the property. The claimant estimates the reduction in value due to the restrictions to be \$1,080,000.

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.

Findings of Fact

The claim is based on state land use regulations that restrict the use of the subject property, including Goal 14 and OAR 660-004-0040, which Yamhill County has implemented through its VLDR-2.5 zone. Both of these land use regulations were 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 all the laws that 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 divisions of rural residential land were in effect when the claimant acquired the subject property in 1968. As a result, these laws are not exempt under ORS 197.352(3)(E).

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 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 divide the subject property into approximately 30 parcels for residential use. The claim asserts that the laws enforced by the Commission or the department reduce the fair market value of the subject property by \$1,080,000. 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 Gary L. Guthrie to use the subject property for a use permitted at the time he acquired the property on June 21, 1968.

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 Gary L. Guthrie's partition of the 2.5-acre property and the 23.6-acre property into approximately 30 lots for residential development: applicable provisions of Goal 14 and OAR 660-004-0040. 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 June 21, 1968.
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 June 21, 1968.
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 April 6, 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 (BALLOT MEASURE 37) CLAIM FOR COMPENSATION

OREGON DEPARTMENT OF FORESTRY

Final Staff Report and Recommendation

April 27, 2006

STATE CLAIM NUMBER: M 118600

NAMES OF CLAIMANTS:

The Gary L. Guthrie Trust,
Gary L. Guthrie, Trustee and
Gary L. Guthrie, an individual

MAILING ADDRESS:

Gary L. Guthrie
23230 NE Hagey Rd.
Dundee, OR 97115

IDENTIFICATION OF PROPERTY:

Township 3S, Range 3W:
Section 25,
Tax Lots 3325-2100 and
3325-2600
Yamhill County

OTHER CONTACT INFO:

Mark P. O'Donnell, Esq.
Kristian Roggendorf, Esq.
O'Donnell & Clark LLP
1706 NW Glisan, Suite 6
Portland, OR 97209

DATE RECEIVED BY DAS:

June 14, 2005

180-DAY DEADLINE:

April 29, 2006¹

I. SUMMARY OF CLAIM

See Department of Land Conservation and Development (DLCD) Final Report.

II. SUMMARY OF STAFF RECOMMENDATION

Based on the findings and conclusions set forth below, the Department of Forestry (ODF) has determined the claim is not valid as to land use regulations administered by ODF or the

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 the *MacPherson v. Dept. of Admin. Svcs.*, 340 Or 117 (2006).

Oregon Board of Forestry (Board) because none of the laws identified in the claim and administered by the Board or ODF restrict the claimant's right to divide the subject property and develop it for residential use. ORS 527.730 provides that "[n]othing in the Oregon Forest Practices Act shall prevent the conversion of forestland to any other use." The claim submitted by the claimants proposes a conversion. To the extent that the claimants may propose a forest operation in conjunction with the conversion, claimants have not submitted a written notification as required by law. Without a notification ODF is unable to determine whether the laws listed in the claim apply to the claimant's use of the property or restrict his use of the property. As a result, ODF has not enforced an existing state land use regulation with respect to the claimant's use of the property. (See the complete recommendation in Section VI. of this report.)

III. COMMENTS ON THE CLAIM

Comments Received

See DLCD Final Report.

IV. TIMELINESS OF CLAIM

See DLCD Final Report for requirements.

Findings of Fact

The claim identifies certain specific regulations as applying to the claimant's ability to use the land by dividing the property and developing it for residential use. The regulations identified in the claim include portions of Oregon Revised Statute chapters 526 and 527 and Oregon Administrative Rules chapter 629. Only laws that were enacted prior to December 2, 2004, the effective date of ORS 197.352, are the basis for the claim. (See citations of statutory and administrative rule history of the Oregon Revised Statutes and Oregon Administrative Rules.)

Conclusions

This claim was submitted to DAS on June 14, 2005, for processing under OAR 125, division 145. The claim identifies several state laws including ORS 526 and 527, and OAR 629 as the basis for the claim. Only laws that were enacted or adopted prior to December 2, 2004, the effective date of ORS 197.352, are the basis for this claim.

V. ANALYSIS OF CLAIM

1. Ownership

ODF adopts the findings of fact and conclusions of law regarding ownership contained in the DLCD Draft Staff Report for this claim.

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 claimants or a family member acquired the property.

Findings of Fact

The claimants desire compensation or the right to divide the 26-acre property into approximately 30 parcels for residential development. The claim lists the following state statutes and rules administered by ODF or the Board as laws that restrict the use of the property as the basis for the claim: ORS 526.016; 526.031, 526.166, 526.168, 526.194, 526.305 to 370, 526.425, 526.490, 526.500 to 515, 526.900, 526.905, 527.610 to 770, 527.990 and 527.992. The claim also lists the following rules of the Board: OAR 629-001-0000 to 0055, 629-020-0000 to 0070, 629-045-0005 to 0010, 629-605-0100 to 0500, 629-610-0000 to 0090, and 629-625-0000 to 0700. The only discussion in the claim as to how or why these laws restrict the use of the property that the claimants seek to carry out is the following statement: "State forestry statutes limit the development and division of land zoned for forestry." The property is not zoned for forestry, and the laws listed in the claim only apply to forest operations (which is not the use the claimants have described in their claim).

One of the cited laws, ORS 527.730, Conversion of forestland to other uses, states, "[n]othing in the Oregon Forest Practices Act shall prevent the conversion of forestland to any other use." No laws enforced by the Board or ODF restrict the division of the property or the establishment of dwellings.

The subject property may include trees. Certain uses of property are forest "operations" that are regulated under the Forest Practices Act. If trees are harvested for commercial use, some laws listed in the claim will apply to the operation.

A notification of intent to conduct a forest operation is required in order for ODF to determine whether laws it or the Board may enforce apply to the claimant's intended use of the subject property in a way that restricts the use of the subject property, and reduces its fair market value. No notification has been made.

The claim lists additional state statutes and regulations that are administered by the Departments of Land Conservation and Development, Environmental Quality, and Water Resources. These statutes and regulations are not administered or enforced by the Board and ODF and are not addressed in this report.

Conclusions

Nothing in the laws that are listed in the claim and enforced or administered by ODF or the Board applies to or restricts the division of the property or residential development of this property by the claimants.

Persons proposing to conduct a forest operation are required to submit a notification of the operation to ODF. Nothing in ORS 197.352 relieves an operator or landowner from this obligation, and until a notification is submitted, ODF is unable to determine whether laws it or the Board administers apply to the claimant's use of the property.

3. Effect of Regulations on Fair Market Value

In order to establish a valid claim, ORS 197.352(1) requires that any laws described in Section V.(2) of this report must have "the effect of reducing the fair market value of the property, or any interest therein."

Findings of Fact

The claimants have not demonstrated that any land use regulations administered by ODF or the Board restrict their use of the subject property or reduce its fair market value.

Conclusions

The claimants have not demonstrated that laws enforced or administered by ODF or the Board restrict their use of this property and thus, have not demonstrated that those laws reduce the fair market value of the subject property.

4. Exemptions under ORS 197.352(3)

ORS 197.352 does not apply to certain land use regulations. These exemptions are set forth in ORS 197.352(3).

Findings of Fact

ORS 197.352(3) exempts laws that were enacted before a claimant acquired their interest in the property. Gary L. Guthrie acquired an interest in the property on June 27, 1968. Most forest practice laws were enacted in 1971 and 1973, although some date back to 1941. ODF is unable to determine whether 197.352(3)(E) or other exemptions in 197.352(3) may apply because the claimants have not proposed a use that is subject to these laws.

Some FPA regulations, now in OAR 629, divisions 625, 630, 635, and 640 were enacted to control water pollution resulting from forest operations. ORS 197.352(3)(B) specifically exempts regulations "restricting or prohibiting activities for the protection of public health and safety..., including pollution control." Such regulations may apply to the property, depending upon the activities the claimants may wish to undertake.

Other FPA regulations cited by the claimants may be exempted under 197.352(3).

Conclusions

ODF concludes that many of the listed land use regulations are likely exempt under ORS 197.352(3). Until there is a notification of an operation, however, a final determination of the applicability of the listed laws to a particular forest operation on the property cannot be made.

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 claimants have identified. Similarly, this report only addresses the exemptions provided for under ORS 197.352(3) that are clearly applicable, given the information provided to the department in the claim. The claimants should be aware that the less information they have provided to the department in the claim, the greater the possibility that there may be additional laws that will later be determined to continue to apply to their use of the subject property.

VI. FORM OF RELIEF

Based on the current record, the claimants are not entitled to relief under ORS 197.352 from ODF or the Board. ODF denies any relief for this claim because neither the Board nor the Department has enforced laws that restrict the division of the subject property into parcels or lots, or the use of the property for residential purposes.

VII. COMMENTS ON THE DRAFT REPORT

ODF issued its draft staff report on this claim on April 7, 2006. OAR 125-145-0100(3), provides 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 27, 2006

STATE CLAIM NUMBER: M118600

NAME OF CLAIMANTS: Gary L. Guthrie

MAILING ADDRESS: 23230 NE Hagey
Dundee, OR 97115

PROPERTY IDENTIFICATION: T3S, R3W, section 25 WM,
tax lots 2100 and 2600

OTHER CONTACT INFORMATION: Mark P. O'Donnell
1706 NW Glisan, Suite 6
Portland, Oregon 97209

DATE RECEIVED BY DAS: June 14, 2005

180-DAY DEADLINE: April 29, 2006¹

I. CLAIM

The claimant, Gary L. Guthrie, seeks compensation in the amount of \$1,080,000 for the reduction in fair market value in the Property as a result of numerous statutes and rules. The statutes and rules listed that are administered by the Oregon Water Resources Department (WRD) include ORS chapter 536 and 537, and OAR 690-005-0010 to 690-005-0060, 690-009-0010 to 690-009-0050, and 690-010-0045 to 690-010-0070. The property is located at 23230 NE Hagey, Dundee, OR in Yamhill County and is described as T3S, R3W, section 25 WM, tax lots 2100 and 2600. (See claim.)

II. SUMMARY OF STAFF RECOMMENDATION

Based on the findings and conclusions set forth below, WRD has determined that the claim is not valid, 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

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.

enforced an existing law since December 2, 2004 to restrict the claimant's use of the property. Based on this determination, the department 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.

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, one comment was received from the notice mailed, which WRD has considered 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 ORS 197.352 (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 ORS 197.352 (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

WRD incorporates by reference the findings of fact in the Draft Staff Report of the Department of Land Conservation and Development (DLCD) regarding the timeliness of this claim.

Conclusions

The claim was submitted within two years of December 2, 2004, based in part on state laws in effect prior to December 2, 2004, and based in part on state laws enacted after 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

WRD incorporates by reference the findings of fact in the Draft Staff Report of the Department of Land Conservation and Development (DLCDD) regarding the timeliness of this claim.

Conclusions

The claimant, Gary L. Guthrie is an “owner” of the subject property as that term is defined by Section 11(C) of Ballot Measure 37, as of June 21, 1968.

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 claimant or a family member acquired the property.

Findings of Fact

The claim lists ORS 536.032 to 536.090 and 537.505 to 537.791, and Oregon administrative rules 690-005-0010 to 690-005-0060, 690-009-0010 to 690-009-0050, and 690-010-0045 to 690-010-0070 under the heading “Water Resources Department.” The claim contains a statement that these laws “are tied to statewide planning and development goals and thereby limit development of rural parcels.” There is no evidence or argument presented concerning how or why these laws are “land use regulation” that restrict the use of the property the claimants wish to carry out.

The claimant has not asserted that WRD has denied an application for a permit, or limited the use of water under an existing water right with respect to the claimant’s use of tax lots 2100 and 2600. According to information in WRD’s water right information system, there is no record of an application by a Gary L. Guthrie for a permit to use water on the Property.

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 Oregon law. WRD has not taken any action to enforce any law that restricts any right claimant may have to use water on tax lots 2100 and 2600.

Conclusions

The claimant has not applied for a water right for 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 right to use tax lots 2100 and 2600 for any purpose. 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 that any laws described in Section V(2) of this report must have the “effect of reducing the fair market value of the property, or any interest therein.”

Findings of Fact

The claim includes an estimate of \$1,080,000 as the reduction in the subject property’s fair market value due to current regulations. This amount is based on an estimate of market values.

Conclusions

The claim provides no evidence that the Water Resources Department has enforced a “land use regulation” in a manner that restricts claimant’s use of the property or has reduced its fair market value. 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 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. WRD has not analyzed whether any of the exemptions 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 has 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 recommends that this claim be denied as to laws administered by WRD.