

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. M 118611
(BALLOT MEASURE 37) OF)
Lowell Patton, CLAIMANT)

Claimant: Lowell Patton (the Claimant)

Property: Township 1S, Range 1E, Section 22C, Tax lot 4300
Township 1S, Range 1E, Section 28AA, Tax lot 100
Multnomah County (the property)

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

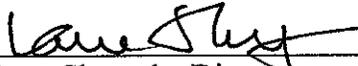
Claimant submitted the Claim to the State of Oregon under ORS 197.352. Under OAR 125-145-0010 *et seq.*, the Department of Administrative Services (DAS) referred the Claim to the Department of Land Conservation and Development (DLCD) as the regulating entity. This order is based on the record herein, 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

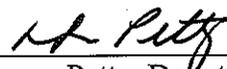
The Claim is denied as to laws administered by DLCD and the Land Conservation and Development Commission (LCDC) for the reasons set forth in the DLCD Report.

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 chapter 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 chapter 125, division 145, and ORS chapter 293.

FOR DLCD AND THE LAND
CONSERVATION AND DEVELOPMENT
COMMISSION:


Lane Shetterly, Director
DLCD
Dated this 26th day of April, 2006.

FOR the DEPARTMENT OF
ADMINISTRATIVE SERVICES:


Dugan Petty, Deputy Administrator
DAS, State Services Division
Dated this 26th 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)

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 26, 2006

STATE CLAIM NUMBER: M118611

NAME OF CLAIMANT: Lowell Patton

MAILING ADDRESS: PO Box 85
Carver, Oregon 97015

PROPERTY IDENTIFICATION: Township 1S, Range 1E, Section 22C
Tax lot 4300
Township 1S, Range 1E, Section 28AA
Tax lot 100
Multnomah County

OTHER CONTACT INFORMATION: William C. Cox, Attorney at Law
0244 California Street
Portland, Oregon 97219

DATE RECEIVED BY DAS: June 16, 2005

180-DAY DEADLINE: May 1, 2006¹

I. SUMMARY OF CLAIM

The claimant, Lowell Patton, seeks compensation in the amount of \$1,380,000 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 property, consisting of two tax lots, into 12 to 14 lots that are 7,000 to 10,000 square feet each and to develop each lot with a dwelling. Both tax lots are located near the intersection of SW Boones Ferry Road and SW TaylORS Ferry Road, Portland, in Multnomah 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 not valid because neither the Land Conservation and Development Commission (the Commission) nor the department has

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).

enforced laws that restrict the claimant's use of the private real property. (See the complete recommendation in Section VI. of this report.)

III. COMMENTS ON THE CLAIM

Comments Received

On July 27 and 28 and August 17, 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, two written comments, evidence or information were received in response to the 10-day notice.

The comments do not address whether the claim meets the criteria for relief under ORS 197.352. Comments concerning the effects a use of the 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 letters in the department's claim file.)

IV. TIMELINESS OF CLAIM

Requirement

ORS 197.352(5) requires that a written demand for compensation be made:

1. For claims arising from land use regulations enacted prior to the effective date of Measure 37 (December 2, 2004), within two years of that effective date or the date the public entity applies the land use regulation as an approval criterion 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 criterion, whichever is later.

Findings of Fact

This claim was submitted to DAS on June 16, 2005, for processing under OAR 125, division 145. The claim identifies "all statewide planning goals and administrative rules, statutes adopted and enforced since purchase of property by claimant" and specifically, Statewide Planning Goals 5 (Natural Resources) and 14 (Urbanization) and OAR 660, divisions 16 and 23, 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 subject property consists of two tax lots. The claimant, Lowell Patton, acquired tax lot 100 on April 27, 1983, as reflected by a personal representative’s deed included with the claim. He acquired tax lot 4300 on November 20, 1992, as reflected by a quitclaim deed included with the claim. A Measure 37 Lot Book Service Report submitted with the claim establishes the claimant’s current ownership of the subject property.

Conclusions

The claimant, Lowell Patton, is an “owner” of the subject property as that term is defined in ORS 197.352(11)(C), as of April 27, 1983, for tax lot 100 and as of November 20, 1992, for tax lot 4300.

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 “all statewide planning goals and administrative rules, statutes adopted and enforced since purchase of property by claimant” restrict the use of the property and specifically states that Goal 5 and OAR 660, divisions 16 and 23, limit “use of certain portions of subject property based upon resource designation.” The claim goes on to state, “Goal 14 Urban Growth Boundary provisions and expansion restrictions force higher density while conservation provisions decrease the areas of parcels upon which housing can be constructed. The two in combination work to reduce the buildability and character of claimant’s land.”²

² The claim further that the City of Portland imposed Conservation (C) and Protection (P) overlays on part or all of both parcels on July 15, 1988, and a Scenic (S) overlay on part or all of both parcels on April 12, 1991; the Scenic (S) overlay imposes height limitations and the Protection (P) overlay prohibits development; and the Conservation

Tax lot 100 is currently zoned by the City of Portland as “single dwelling residential 7,000 square feet with scenic and environmental conservation overlays,” and tax lot 4300 is currently zoned as “single dwelling residential 10,000 square feet with scenic, environmental conservation and environmental protection overlays.”³ Both base districts are urban zones. The subject property is within the City of Portland’s Urban Growth Boundary (UGB) and also within the limits of the City of Portland.

The claim cites Goal 14 as restricting the use of the subject property. However, in general, the zoning of a particular property within a city and within a UGB is determined by the city with land use jurisdiction over the property. In some circumstances, the Commission’s rules or state statutes may apply to a local government decision regarding zoning, but usually, within a city, state laws require or encourage a higher intensity of development rather than restrict the use of real property. In this case, the claimant has not established that amendments to Goal 14, adopted after the claimant acquired tax lot 100 on April 27, 1983, and tax lot 4300 on November 20, 1992, restrict the use of the subject property and have the effect of reducing the fair market value of that real property.

The claim also asserts that Goal 5 restricts the use of the property. The city adopted the scenic overlay zone pursuant to Goal 5 on April 12, 1991, and the environmental conservation and environmental protection zones pursuant to Goals 5, 6 (Air, Water and Land Resources Quality) and 7 (Natural Hazards) on January 23, 1992.

The local overlay zones adopted pursuant to Goals 5, 6 and 7 were in effect when the claimant acquired tax lot 4300 on November 20, 1992.

With regard to tax lot 100, which the claimant acquired on April 27, 1983, the claim asserts the scenic corridor overlay regulations restrict the height of urban dwelling structures on the property. To the extent that local regulation may impose such a restriction, that restriction is not based upon compliance with Goal 5. The claim does not establish how Goal 5 restricts the claimant’s use of tax lot 100. To the extent compliance with Goals 6 and 7 is not exempt under ORS 197.352(3)(B) (see Section V.4), the claimant has not established how these goals restrict the use of the subject property. Rather, it appears that the non-exempt regulations in the environmental overlay zones that implement these goals address planting of native vegetation, minimum front yard setbacks, fences, parking and truck area buffer exterior lighting and exterior storage. The claimant has not established how any of these local restrictions are required for goal compliance, or how these goals otherwise restrict the claimant’s use of this urban property.⁴

(C) overlay imposes maximum disturbance regulations, additional yard setback requirements, tree cutting restrictions and environmental reviews.

³ The environmental conservation and environmental protection overlays were adopted with the Southwest Hills Resource Protection Plan on January 23, 1992, and applied to the subject property as follows: approximately 40 percent of tax lot 100 and approximately 45 percent of tax lot 4300. Stephens Creek, a tributary of the Willamette River, rises in the southeast corner of tax lot 100 and flows in a northeasterly direction through both parcels. Both parcels are also within the city-designated Potential Landslide Hazard Area because their average slope is 30 percent, with some portions over 50 percent. (See the City of Portland’s November 23, 2005, Ballot Measure 37 Claim for Compensation Staff Report and Recommendation, copy of which is in the department’s claim file.)

⁴ See the copy of City of Portland’s November 23, 2005, Ballot Measure 37 Claim for Compensation Staff Report and Recommendation in the department’s claim file.

Based on the information in the claim, the department has not identified any state laws that restrict the claimant's use of the subject property.

Conclusions

The claim does not establish any state laws that currently restrict the use of the claimant's property. Because the subject property is located within the city limits of the City of Portland, neither the Commission nor the department enforces laws that require specific zoning of the property. To the extent regulations restricting the use of the subject property were not in effect when the claimant acquired the property, the claimant has not established that any state regulations, particularly Goals 5, 6 and 7, restrict the use of the property as a result of local regulations adopted pursuant to these goals. Based on the record before the department, neither the Commission nor the department enforces any laws that restrict the use of the claimant's property.

3. Effect of Regulations on Fair Market Value

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

As explained in Section V.(2) of this report, the claimant, Lowell Patton, has not established that any state laws restrict the use of the subject property. Accordingly, the department cannot determine that any laws enforced by the Commission or the department have had the effect of reducing the fair market value of the property.

4. Exemptions Under ORS 197.352(3)

ORS 197.352 does not apply to certain land use regulations. In addition, ORS 197.352(3), certain types of laws are exempt from ORS 197.352.

As explained in Section V.(2) of this report, the claimant, Lowell Patton, has not established that any state laws restrict the use of the subject property.

In addition, ORS 197.352(3)(B) exempts land use regulations "[r]estricting or prohibiting activities for the protection of public health and safety." Even if elements of Goal 5, 6 or 7⁵ could be construed to restrict the use of tax lot 100 of the subject property by virtue of their implementation through the City of Portland's scenic, environmental conservation and environmental protection overlay zones, these regulations are exempt under ORS 197.352(3)(B) to the extent they are necessary for the protection of public health and safety.⁶

⁵ These laws were in effect when the claimant acquired tax lot 4300 and therefore, are exempt as to that tax lot under ORS 197.352(3)(E), which exempts laws in effect when the claimant acquired the property.

⁶ The city's Southwest Hills Resource Protection Plan was adopted pursuant to Goals 5, 6 and 7. The City of Portland's plan contains explicit findings for how the standards of this plan are intended to protect public health and safety. See the copy of City of Portland's November 23, 2005, Ballot Measure 37 Claim for Compensation Staff Report and Recommendation in the department's claim file.

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 record for this claim, the claimant has not established that any state laws enforced by the Commission or the department restrict the use of the subject property, and have the effect of reducing the fair market value of the subject property. Because the subject property is located within the City of Portland, neither the Commission nor the department enforces laws that require specific zoning of the subject property, and the claimant has not established that any other state regulations restrict the use of the property in a manner that reduces its fair market value.

Conclusions

Based on the record before the department, the claimant, Lowell Patton, has not established that he is entitled to relief under ORS 197.352(1) as a result of land use regulations enforced by the Commission or the department. Therefore, the department staff recommends that this claim be denied.

VII. COMMENTS ON THE DRAFT STAFF REPORT

The department issued its draft staff report on this claim on April 10, 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.