

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)
COMPENSATION UNDER ORS 197.352)
(BALLOT MEASURE 37) OF)
Bonnie Stellflug, CLAIMANT)

FINAL ORDER
CLAIM NO. M 118692

Claimant: Bonnie Stellflug (the Claimant)

Property: Township 1S, Range 10W, Section 7AC, Tax lots 1400 and 1401,
Tillamook 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

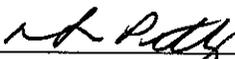
The Claim is denied as to laws administered by DLCD and the Land Conservation and Development Commission (LCDC) for the reasons set forth in the DLCD Report.

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 11th day of May, 2006.

FOR the DEPARTMENT OF
ADMINISTRATIVE SERVICES:


Dugan Petty, Deputy Administrator
DAS, State Services Division
Dated this 11th day of May, 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

May 11, 2006

STATE CLAIM NUMBER: M118692

NAME OF CLAIMANT: Bonnie Stellflug

MAILING ADDRESS: 6880 Munson Creek Road
Tillamook, Oregon 97141

PROPERTY IDENTIFICATION: Township 1S, Range 10W, Section 7AC
Tax lots 1400 and 1401
Tillamook County

OTHER CONTACT INFORMATION: Linda Udenby
6890 Munson Creek Road
Tillamook, Oregon 97141

DATE RECEIVED BY DAS: June 28, 2005

180-DAY DEADLINE: May 13, 2006¹

I. SUMMARY OF CLAIM

The claimant, Bonnie Stellflug, seeks compensation in the amount of \$300,000 for the reduction in fair market value as a result of certain land use regulations that are alleged to restrict the use of certain private real property. The claimant desires compensation or the right to place a single-family dwelling on the subject property. The 0.23-acre property is located on 4th Street, Cape Meares, in Tillamook 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. The claim is based on applicable provisions of Statewide Planning Goal 18 (Beaches and Dunes) and regulations enforced by the department and the Land Conservation and Development Commission (the Commission) that are exempt under ORS 197.352(3)(B) as "restricting or prohibiting activities for the protection of public health and safety, such as fire and building codes, health and

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).

sanitation regulations, solid or hazardous waste regulations, and pollution control regulations.”
(See the complete recommendation in Section VI. of this report.)

III. COMMENTS ON THE CLAIM

Comments Received

On August 15, 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, eight written comments, evidence or information were received in response to the 10-day notice.

The comments are relevant to whether the restriction of the claimant’s use of the property reduces the fair market value of the property and whether the law that is the basis for the claim is exempt under ORS 197.352(3)(B). The comments have been considered by the department in preparing this report. (See 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 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 28, 2005, for processing under OAR 125, division 145. The claim identifies Goal 18 as the law that restricts 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, Bonnie Stellflug, acquired the subject property on May 12, 1971 (tax lot 1401) and December 19, 1973 (tax lot 1400), as reflected by warranty deeds included with the claim. A 2005 Tillamook County tax statement submitted with the claim establishes the claimant’s current ownership.

Conclusions

The claimant, Bonnie Stellflug, is an “owner” of the subject property, as that term is defined by ORS 197.352(11)(C), as of May 12, 1971 (tax lot 1401) and December 19, 1973 (tax lot 1400).

2. The Laws That are the Basis for This Claim

In order to establish a valid claim, ORS 197.352(1) requires, in part, that a law must restrict the claimant’s use of private real property in a manner that reduces the fair market value of the property relative to how the property could have been used at the time the claimant or a family member acquired the property.

Findings of Fact

The claim indicates that Goal 18 “prohibits building unless an exception (is) taken by Tillamook County.”

The claim is based on Tillamook County’s current Land Use Ordinance Section 3.085 Beach and Dune Overlay Zone (BD)² and the applicable provisions of state law that require such zoning. The claimant’s property is zoned beach and dune as required by Goal 18 because the claimant’s property is within the “beach and dune” area as defined by Goal 18. Goal 18 became effective on January 1, 1977, and required that “beach and dune lands,” as defined by the Goal, be zoned beach and dune. The county’s Comprehensive Plan Goal 18 element was first acknowledged by the Commission on March 1, 1984. The county’s ordinance restricts development in areas subject to ocean flooding.

² The purpose of the Beach and Dune Overlay Zone is to regulate development and other activities in beach and dune areas to meet the requirements of Goal 18 “to conserve, protect, where appropriate, develop and where appropriate restore the resources, benefits, and values of coastal beach and dune areas; and reduce the hazard to human life and property from natural events or man-induced actions associated with these areas.” The overlay zone establishes guidelines and criteria for the assessment of hazards resulting from beach and dune processes and development activities in beach and dune areas.

The subject property is also within an area designated as a "Velocity Zone" in the Federal Emergency Management Agency flood maps for Tillamook County. These areas are subject to periodic ocean flooding accompanied by wave velocity forces. Properties within areas with that designation are subject to the restrictions prescribed by Section 3.060 of Tillamook County's land use ordinance and the Flood Hazard Overlay Zone (FH)³ adopted to comply with Goal 7 (Natural Hazards).⁴

Conclusions

The current zoning requirements established by Goal 18 were all enacted or adopted after claimant Bonnie Stellflug acquired the subject property on May 12, 1971 (tax lot 1401) and December 19, 1973 (tax lot 1400). These land use regulations do not allow development on the subject property. Laws enacted or adopted since the claimant acquired the subject property in 1971 and 1973 restrict the claimant's desired use of the property relative to when the claimant acquired it.

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 use 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 the subject property until there is a specific proposal for that use. When a 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 \$300,000 as the reduction in the subject property's fair market value due to current regulations. This amount is based on the claimant's estimate of comparative property values.

Conclusions

As explained in Section V.(1) of this report, Bonnie Stellflug is the claimant. She acquired the subject property on May 12, 1971 (tax lot 1401) and December 19, 1973 (tax lot 1400). The state land use regulation alleged to restrict the use of the property relative to the uses allowed in 1971 and 1973 is exempt under ORS 197.352(3)(B). (See Section V.(4) of this report.)

³ The purpose of Section 3.060 Flood Hazard Overlay Zone is "to promote the public health, safety and general welfare and to minimize public and private losses or damages due to flood conditions in specific areas."

⁴ Goal 7 was adopted "to protect people and property from natural hazards."

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.

Findings of Fact

The claim is based on state land use regulations that restrict the use of the subject property, including applicable provisions of Goal 18, which Tillamook County has implemented through provisions of its BD zone. The property is also subject to provisions of Tillamook County's FH zone, adopted to comply with provisions of Goal 7. All of these land use regulations were adopted after the claimant acquired the subject property. However, all of these state laws and the local implementing regulations were adopted to protect public health and safety.

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 the development of the claimant's property were in effect when the claimant acquired the property in 1971 and 1973. As a result, these laws are not exempt under ORS 197.352(3)(E). However, Goal 18 is exempt under ORS 197.352(3)(B). ORS 197.352(3)(B) provides an exemption for laws that restrict or prohibit activities "for the protection of public health and safety." Goal 7, as adopted through the county's FH zone, is also exempt from ORS 197.352(3)(B).

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. 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 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 property based on the use 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. Claimant should be aware that the less information she has provided to the department in her claim, the greater the possibility that there may be additional laws that will later be determined to continue to apply to her use of the property.

VI. FORM OF RELIEF

ORS 197.352(1) provides for payment of compensation to an owner of private real property if the Commission or the department has enforced one or more laws that restrict the use of the

property in a manner that reduces its fair market value. In lieu of compensation, the department may choose to not apply the law in order to allow the present owner to carry out a use of the property permitted at the time the current owner acquired the property. The Commission, by rule, has directed that if the department determines a claim is valid, the Director of the department must provide only non-monetary relief unless and until funds are appropriated by the legislature to pay claims.

Findings of Fact

Based on the findings and conclusions set forth in this report, the laws enforced by the Commission or the department that restrict the claimant's desired use of the subject property relative to what was permitted when the claimant acquired it in 1971 and 1973, are exempt under ORS 197.352(3)(B).

Conclusions

Based on the record and the foregoing findings and conclusions, the claimant has not established that she is entitled to relief under ORS 197.352(1) because the laws cited by the claimant as restricting the use of the subject property are exempt under ORS 197.352(3)(B). 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 20, 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.