

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 121599
(BALLOT MEASURE 37) OF)
Oldenstadt, LLC, CLAIMANT)

Claimant: Oldenstadt, LLC (the Claimant)

Property: Township 3S, Range 1E, Section 5, Tax lots 300 and 800,
Clackamas 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 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 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.

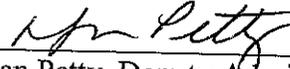
FOR DLCD AND THE LAND
CONSERVATION AND DEVELOPMENT
COMMISSION:
Lane Shetterly, Director



Cora R. Parker, Deputy Director
DLCD

Dated this 6th day of June, 2006.

FOR the DEPARTMENT OF
ADMINISTRATIVE SERVICES:



Dugan Petty, Deputy Administrator
DAS, State Services Division

Dated this 6th day of June, 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

June 6, 2006

STATE CLAIM NUMBER: M121599

NAME OF CLAIMANT: Oldenstadt, LLC¹

MAILING ADDRESS: 24725 Southwest Mountain Road
West Linn, Oregon 97068

PROPERTY IDENTIFICATION: Township 3S, Range 1E, Section 5
Tax lots 300 and 800
Clackamas County

OTHER CONTACT INFORMATION: John W. Shonkwiler
13425 Southwest 72nd Avenue
Tigard, Oregon 97223

DATE RECEIVED BY DAS: July 27, 2005

180-DAY DEADLINE: June 11, 2006²

I. SUMMARY OF CLAIM

The claimant, Oldenstadt, LLC, seeks compensation in the amount of \$12,579,158 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 approximately 92.84-acre property into 46 parcels and to develop a dwelling on each parcel. The subject property is located at 24725 and 24601 Southwest Mountain Road, near West Linn, in Clackamas 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 the claimant's

¹ A letter dated May 22, 2006 from the claimant's attorney, John W. Shonkwiler, indicates that Dennis L. Oldenstadt, Jacqueline B. Oldenstadt, and Donna and Allen Smith each have an ownership interest in the subject property as individuals. Those individuals are not identified as claimants in the claim for relief under ORS 197.352 brought by the Oldenstadt LLC, so any individual interest they may have in the property is not evaluated or decided in this report.

² 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).

desired use of the subject property was prohibited under the laws in effect when the claimant acquired the property in 2000. (See the complete recommendation in Section VI. of this report.)

III. COMMENTS ON THE CLAIM

Comments Received

On August 8, 2005, pursuant to Oregon Administrative Rules (OAR) 125-145-0080, the Oregon Department of Administrative Services (DAS) provided written notice to the owners of surrounding properties. According to DAS, nine 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 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 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 July 27, 2005, for processing under OAR 125, division 145. The claim identifies provisions of ORS 215 and OAR 660, divisions 4, and 33, 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, Oldenstadt, LLC, acquired the subject property from the Oldenstadt Family Limited Partnership on May 18, 2000, as reflected by a statutory bargain and sale deed included with the claim.³ Dennis Oldenstadt is the registered agent for Oldenstadt, LLC, an active limited liability company registered with Oregon’s Secretary of State. A June 30, 2005, tax statement submitted with the claim establishes the claimant’s current ownership of the subject property.

Conclusions

The claimant, Oldenstadt, LLC, is an “owner” of the subject property as that term is defined by ORS 197.352(11)(C), as of May 18, 2000. Although a corporation can be a “family member” of an owner as that term is defined by ORS 197.352(11)(A), an “owner” that is a corporate entity cannot claim an individual or another entity, including a limited partnership, as a “family member.” Therefore, members of the Oldenstadt family and the Oldenstadt Family Limited Partnership are not “family members” of Oldenstadt, LLC.

2. The Laws That are the Basis for This Claim

In order to establish a valid claim, ORS 197.352(1) 7 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 desires to divide the approximately 92.84-acre property into 46 parcels and to develop a dwelling on each parcel. The claim identifies provisions of ORS 215 and OAR 660, divisions 4, and 33, as restricting land division, parcel size and dwelling development.

The claim is based on Clackamas County’s current Exclusive Farm Use (EFU) zone and the applicable provisions of state law that require such zoning. The claimant’s property is zoned EFU as required by Statewide Planning Goal 3 (Agricultural Lands), in accordance with

³ The Oldenstadt Family Limited Partnership acquired tax lot 300 from the Oldenstadts’ family trust on February 21, 1969, as evidenced by a bargain and sale deed, and tax lot 800 from Dennis Oldenstadt on an unspecified date. Tax lot 300 was first acquired by Frederick Oldenstadt, grandfather of Dennis Oldenstadt, on December 13, 1883, as evidenced by a deed included with the claim. Tax lot 800 was first acquired by Dennis Oldenstadt on April 28, 1948, from a family uncle as noted in the claim. The uncle acquired tax lot 800 on May 27, 1919, as evidenced by a deed.

ORS 215 and OAR 660, division 33, because the claimant's property is "agriculture land" as defined by Goal 3.⁴ Goal 3 became effective on January 25, 1975, and required that agriculture lands as defined by the Goal be zoned EFU pursuant to ORS 215.

Current land use regulations, particularly ORS 215.263, 215.284 and 215.780 and OAR 660, division 33, enacted or adopted pursuant to Goal 3, prohibit the division of EFU-zoned land into parcels less than 80 acres and establish standards for development of dwellings on existing or proposed parcels on that land.

ORS 215.780 establishes an 80-acre minimum size for the creation of new lots or parcels in EFU zones and became effective on November 4, 1993 (Chapter 792, Oregon Laws 1993). ORS 215.263 (2005 edition) establishes standards for the creation of new parcels for non-farm uses and dwellings allowed in an EFU zone.

OAR 660-033-0135 (applicable to farm dwellings) became effective on March 1, 1994, and interprets the statutory standard for a primary dwelling in an EFU zone under ORS 215.283(1)(f). OAR 660-033-0130(4) (applicable to non-farm dwellings) became effective on August 7, 1993, and was amended to comply with ORS 215.284(4) on March 1, 1994. The Land Development and Conservation Commission (the Commission) subsequently adopted amendments to comply with House Bill 3326 (Chapter 704, Oregon Laws 2001, effective on January 1, 2002), which were effective on May 22, 2002. (See administrative rule history for OAR 660-033-0100, -0130 and -0135.)

When the claimant acquired the subject property on May 18, 2000, it was subject to the current laws in effect, as described above.

Conclusions

The current zoning requirements, minimum lot size and dwelling standards established by applicable provisions of Goal 3, ORS 215 and OAR 660, division 33, were all enacted or adopted before the claimant, Oldenstadt, LLC, acquired the subject property on May 18, 2000. These land use regulations do not allow the division of the approximately 92.84-acre property into 46 parcels or the development of a dwelling on each parcel. As a result, state land use regulations do not restrict Oldenstadt, LLC's use of the subject property relative to how the property could have been used at the time the claimant acquired the 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."

⁴ The claimant's property is "agriculture land" because it contains Natural Resources Conservation Service Class I-VI soils.

Findings of Fact

The claim includes an estimate of \$12,579,158 as the reduction in the subject property's fair market value due to current regulations. This amount is based on the assessment of fair market values for similar properties.

Conclusions

As explained in Section V.(1) of this report, the claimant is Oldenstadt, LLC, which acquired the subject property on May 18, 2000. No state laws enacted or adopted since the claimant acquired the subject property restrict the use of the property relative to the uses allowed in 2000. Therefore, the fair market value of the subject property has not been reduced as a result of land use regulations enforced by the Commission or the department.

4. Exemptions Under ORS 197.352

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 Goal 3, ORS 215 and OAR 660, division 33, which Clackamas County has implemented through its current EFU zone. All of these laws were enacted or adopted before the claimant acquired the subject property on May 18, 2000.

Conclusions

All of the state land use regulations that restrict the claimant's desired use of the subject property were in effect when the claimant acquired the property. Therefore, these state land use regulations are exempt under ORS 197.352(3)(E), which exempts laws in effect when the claimant acquired 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 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, laws enforced by the Commission or the department do not restrict the claimant's division and development of the subject property

relative to what was permitted when the claimant acquired the subject property in 2000. The laws enforced by the Commission or the department do not reduce the fair market value of the subject property. The state laws restricting the use of the subject property are exempt under ORS 197.352(3)(E).

Conclusions

Based on the record and the foregoing findings and conclusions, the claimant has not established that it 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 recommends that this claim be denied.

VII. COMMENTS ON THE DRAFT STAFF REPORT

The department issued its draft staff report on this claim on May 18, 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.