

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. M121710
(BALLOT MEASURE 37) OF)	
Barbara Oppenlander, CLAIMANT)	

Claimant: Barbara Oppenlander (the Claimant)

Property: Township 1N, Range 4W, Section 28, Tax lots 200 and 203, Washington County
(the Property)

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

Claimant submitted the Claim to the State of Oregon under ORS 197.352. Under OAR 125-145-0010 *et seq.*, the Department of Administrative Services (DAS) referred the Claim to the Department of Land Conservation and Development (DLCD) as the regulating entity. This order is based on the record herein, including the Findings and Conclusions set forth in the Final Staff Report and Recommendation of DLCD (the DLCD Report) attached to and by this reference incorporated into this order.

ORDER

The Claim is approved as to laws administered by DLCD and the Land Conservation and Development Commission (LCDC) for the reasons set forth in the DLCD Report, and subject to the following terms:

1. In lieu of compensation under ORS 197.352, the State of Oregon will not apply the following laws to Barbara Oppenlander's division of the 7.75-acre property into two parcels and to her development of a dwelling on one of the parcels: applicable provisions of Goal 3, ORS 215 and OAR 660, division 33. These land use regulations will not apply to the claimant only to the extent necessary to allow her to use tax lot 203 for the use described in this report, and only to the extent that use was permitted when she acquired it on June 17, 1971, and to allow her to use tax lot 200 for the use described in this report, only to the extent that use was permitted when she acquired it on November 15, 1993. The department acknowledges that the relief to which the claimant is entitled under ORS 197.352 may not allow her to use tax lot 200 in the manner set forth in the claim.

2. The action by the State of Oregon provides the state's authorization to the claimant to use tax lot 203 for the use described in this report, subject to the standards in effect on June 17, 1971, and provides the state's authorization to the claimant to use tax lot 200 for the use described in this report, subject to the standards in effect on November 15, 1993. On November 15, 1993, tax lot 200 was subject to compliance with Washington County's acknowledged EFU zone, and the applicable provisions of Goal 3, ORS 215 and OAR 660, division 33, then in effect.

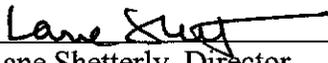
3. To the extent that any law, order, deed, agreement or other legally enforceable public or private requirement provides that the subject property may not be used without a permit, license or other form of authorization or consent, the order will not authorize the use of the property unless the claimant 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 her 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.

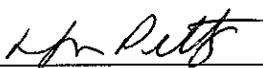
This Order is entered by the Director of the DLCD as a final order of DLCD and the Land Conservation and Development Commission under ORS 197.352, OAR 660-002-0010(8), and OAR 125, division 145, and by the Deputy Administrator for the State Services Division of the DAS as a final order of DAS under ORS 197.352, OAR 125, division 145, and ORS 293.

FOR DLCD AND THE LAND CONSERVATION
AND DEVELOPMENT COMMISSION:



Lane Shetterly, Director
DLCD
Dated this 12th day of June, 2006.

FOR the DEPARTMENT OF ADMINISTRATIVE
SERVICES:



Dugan Petty, Deputy Administrator
DAS, State Services Division
Dated this 12th day of June, 2006.

NOTICE OF RIGHT TO APPEAL OR OTHER JUDICIAL RELIEF

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

1. Judicial review under ORS 183.484: Judicial review under ORS 183.484 may be obtained by filing a petition for review within 60 days from the service of this order. A petition for judicial review under ORS 183.484 may be filed in the Circuit Court for Marion County or the Circuit Court in the county in which you reside.
2. A cause of action under ORS 197.352 (Measure 37 (2004)): If a land use regulation continues to apply to the subject property more than 180 days after the present owner of the property has made written demand for compensation under ORS 197.352¹, the present owner of the property, or any interest therein, shall have a cause of action in the circuit court in which the real property is located.

(Copies of the documents that comprise the record are available for review at the Department's office at 635 Capitol Street NE, Suite 150, Salem, Oregon 97301-2540)

FOR INFORMATION ONLY

The Oregon Department of Justice has advised the Department of Land Conservation and Development that “[i]f the current owner of the real property conveys the property before the new use allowed by the public entity is established, then the entitlement to relief will be lost.”

¹ By order of the Marion County Circuit Court, “all time lines under Measure 37 [were] suspended indefinitely” on October 25, 2005. This suspension was lifted on March 13, 2006 by the court. As a result, a period of 139 days (the number of days the time lines were suspended) has been added to the 180-day time period under ORS 197.352(6) for claims that were pending with the state on October 25, 2005.

ORS 197.352 (BALLOT MEASURE 37) CLAIM FOR COMPENSATION

**OREGON DEPARTMENT OF LAND CONSERVATION AND DEVELOPMENT
Final Staff Report and Recommendation**

June 12, 2006

STATE CLAIM NUMBER: M121710

NAME OF CLAIMANT: Barbara Oppenlander

MAILING ADDRESS: 48840 Northwest Oppenlander Lane
Forest Grove, Oregon 97116

PROPERTY IDENTIFICATION: Township 1N, Range 4W, Section 28
Tax lots 200 and 203
Washington County

OTHER CONTACT INFORMATION: Kevin Oppenlander
1717 22nd Avenue
Forest Grove, Oregon 97116

DATE RECEIVED BY DAS: August 3, 2005

180-DAY DEADLINE: June 18, 2006¹

I. SUMMARY OF CLAIM

The claimant, Barbara Oppenlander, seeks compensation in the amount of \$150,000 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 adjust the property line of tax lots 200 and 203 and to divide the total 7.75-acre property into two parcels and develop a dwelling on one of the resulting parcels. The subject property is located at the geographic coordinates listed above, near Forest Grove, in Washington County. (See claim.)

II. SUMMARY OF STAFF RECOMMENDATION

Based on the findings and conclusions set forth below, the Department of Land Conservation and Development (the department) has determined that the claim is valid. Department staff recommends that, in lieu of compensation, the requirements of the following state laws enforced by the Land Conservation and Development Commission (the Commission) or the department not apply to Barbara Oppenlander's division of the 7.75-acre property into two parcels and to her development of a dwelling on one of the resulting parcels: applicable provisions of Statewide

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).

Planning Goal 3 (Agricultural Lands), ORS 215 and Oregon Administrative Rules (OAR) 660, division 33. These laws will not apply to the claimant only to the extent necessary to allow her to use tax lot 203 for the use described in this report, and only to the extent that use was permitted when she acquired it on June 17, 1971, and to allow her to use tax lot 200 for the use described in this report, and only to the extent that use was permitted when she acquired it on November 15, 1993. The department acknowledges that the relief to which the claimant is entitled under ORS 197.352 may not allow the claimant to use tax lot 200 in the manner set forth in the claim. (See the complete recommendation in Section VI. of this report.)

III. COMMENTS ON THE CLAIM

Comments Received

On October 10, 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 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 August 3, 2005, for processing under OAR 125, division 145. The claim identifies provisions of ORS 215 and OAR 660, division 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, Barbara Oppenlander, acquired tax lot 203 on June 17, 1971, as reflected by a warranty deed included with the claim. She acquired tax lot 200 on November 15, 1993, from her husband, Lynn Oppenlander, as reflected by a bargain and sale deed included with the claim. Lynn Oppenlander acquired tax lot 200 on May 13, 1992, from his mother, Mildred Oppenlander, as reflected by a personal representative’s deed included with the claim. Mildred Oppenlander acquired tax lot 200 on May 19, 1965, as reflected by the official record of descriptions of real properties included with the claim. The Washington County Assessor’s Office confirms the claimant’s current ownership of both tax lots.

Conclusions

The claimant, Barbara Oppenlander, is an “owner” of tax lot 203 as that term is defined by ORS 197.352(11)(C), as of June 17, 1971. She is an “owner” of tax lot 200 as of November 15, 1993. The claimant’s mother-in-law, Mildred Oppenlander, and husband, Lynn Oppenlander, are “family members” as defined by ORS 197.352(11)(A) with regard to tax lot 200. The family acquired tax lot 200 on May 19, 1965.

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 the claimant desires to divide the 7.75-acre property into two parcels and to develop a dwelling on one of those parcels, and provisions of ORS 215 and OAR 660, division 33, restrict that desired use.

The claim is based generally on Washington 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 Goal 3, in accordance with ORS 215 and OAR 660, division 33, because the claimant's property is "agricultural land" as defined by Goal 3.² Goal 3 became effective on January 25, 1975, and required that agricultural lands as defined by the Goal be zoned EFU pursuant to ORS 215.

Current land use regulations, particularly ORS 215.213, 215.263 and 215.780 and OAR 660, division 33, enacted or adopted pursuant to Goal 3, prohibit the division of EFU-zoned land in marginal lands counties 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 in a marginal lands county under ORS 215.213. OAR 660-033-0130(4)(e) (applicable to non-farm dwellings in marginal lands counties) became effective on August 7, 1993. 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.)

The claimant's family first acquired tax lot 200 in 1965, prior to the adoption of the statewide planning goals and their implementing statutes and rules.

The claimant acquired tax lot 203 on June 17, 1971, also prior to the adoption of the statewide planning goals and their implementing statutes and regulations. At the time the claimant acquired tax lot 203, it was zoned Agriculture District F-1 by Washington County, which allowed single-family dwellings related to farm use.

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 after the claimant and the claimant's family acquired the subject property in 1965 and 1971 and do not allow the desired division or development of the property. These laws restrict the use of the subject property relative to the uses allowed when the claimant and the claimant's family acquired the property.

This report addresses only those state laws that are identified in the claim, or that the department is certain apply to the subject property based on the uses that the claimant has identified. There may be other laws that currently apply to the claimant's use of the subject property, and that may

² The claimant's property is "agricultural land" because it contains Natural Resources Conservation Service Class I-IV soils.

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 \$150,000 as the reduction in the subject property's fair market value due to current regulations. This amount is based on the claimant's assessment of the property's fair market value.

Conclusions

As explained in Section V.(1) of this report, the claimant is Barbara Oppenlander who acquired tax lot 203 on June 17, 1971, and whose family acquired tax lot 200 on May 19, 1965. 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 and the claimant's family acquired the subject property restrict the desired division and development of the property. The claimant estimates the reduction in value due to the restrictions to be \$150,000.

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 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 Washington County has implemented through its current EFU zone. All of these land use regulations were enacted or adopted after the claimant's family acquired tax lot 200 and after the claimant acquired tax lot 203.

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 division and development of the claimant's property were in effect when the claimant family acquired tax lot 200 in 1965 and when the claimant acquired tax lot 203 in 1971. As a result, these laws are not exempt under ORS 197.352(3)(E).

Laws in effect when the claimant's family acquired tax lot 200 in 1965 and the claimant acquired tax lot 203 in 1971 are exempt under ORS 197.352(3)(E) and do not provide a basis for compensation. In addition, other land use laws enacted or adopted for a purpose set forth in ORS 197.352(3)(A) to (D) are also exempt and would not provide a basis for compensation.

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 subject 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 subject 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 7.75-acre property into two parcels and to develop a dwelling on one of the resulting parcels. The claim asserts that the laws enforced by the Commission or the department reduce the fair market value of the subject property by \$150,000. 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 Barbara Oppenlander to use tax lot 203 for a use permitted at the time she acquired that tax lot on June 17, 1971, and to use tax lot 200 for a use permitted at the time she acquired that tax lot on November 15, 1993.

At the time the claimant acquired tax lot 200, it was subject to Washington County's acknowledged EFU zone, and the current lot size requirements and some of the development standards under Goal 3, ORS 215 and OAR 660, division 33, as described in Section V.(2) of

this report. The development standards for farm dwellings under OAR 660-033-0135 were adopted after the claimant acquired tax lot 200.

In addition to the applicable provisions of Goal 3, ORS 215 and OAR 660, division 33, in effect when the claimant acquired tax lot 200 on November 15, 1993, and other laws in effect when the claimant acquired each of the subject tax lots, there may be other laws that 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 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, and depending on when they were enacted or adopted, may continue to apply to the claimant's property. In addition, some of these laws may be exempt under ORS 197.352(3)(A) to (D) and will continue to apply to the subject property on that basis.

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 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 subject property.

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 Barbara Oppenlander's division of the 7.75-acre property into two parcels and to her development of a dwelling on one of the parcels: applicable provisions of Goal 3, ORS 215 and OAR 660, division 33. These land use regulations will not apply to the claimant only to the extent necessary to allow her to use tax lot 203 for the use described in this report, and only to the extent that use was permitted when she acquired it on June 17, 1971, and to allow her to use tax lot 200 for the use described in this report, only to the extent that use was permitted when she acquired it on November 15, 1993. The department acknowledges that the relief to which the claimant is entitled under ORS 197.352 may not allow her to use tax lot 200 in the manner set forth in the claim.
2. The action by the State of Oregon provides the state's authorization to the claimant to use tax lot 203 for the use described in this report, subject to the standards in effect on June 17, 1971, and provides the state's authorization to the claimant to use tax lot 200 for the use described in this report, subject to the standards in effect on November 15, 1993. On November 15, 1993, tax lot 200 was subject to compliance with Washington County's acknowledged EFU zone, and the applicable provisions of Goal 3, ORS 215 and OAR 660, division 33, then in effect.
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 her 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 May 25, 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.