

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. M121857
(BALLOT MEASURE 37) OF)	
John H. Poppe, Sr. CLAIMANT)	

Claimant: John H. Poppe, Sr. (the Claimant)

Property: Tax Lot 500, Township 11S, Range 12E, Section 36, Jefferson 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:

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 John H. Poppe, Sr.'s development of a single family dwelling on the subject property: applicable provisions of Statewide Planning Goal 3, ORS 215, and OAR 660, division 33, enacted after November 15, 1966. These land use regulations will not apply to Mr. Poppe's use of his property only to the extent necessary to allow the claimant a use permitted at the time he acquired the property on November 15, 1966.
2. The action by the State of Oregon provides the state's authorization to the claimant to use his property subject to the standards in effect on November 15, 1966. On that date, the property was subject to applicable provisions of ORS 215 then in effect.

3. To the extent that any law, order, deed, agreement or other legally-enforceable public or private requirement provides that the 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 ORS 227.160, other permits or authorizations from local, state or federal agencies, and restrictions on the use of the property imposed by private parties.

4. Any use of the 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 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 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.

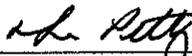
FOR DLCD AND THE LAND CONSERVATION
AND DEVELOPMENT COMMISSION:



Lane Shetterly, Director
DLCD

Dated this 14th day of March, 2006.

FOR the DEPARTMENT OF ADMINISTRATIVE
SERVICES:



Dugan Petty, Deputy Administrator
DAS, State Services Division

Dated this 14th day of March, 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 293.316: Judicial review under ORS 293.316 may be obtained by filing a petition for review within 60 days from the service of this order. Judicial review under ORS 293.316 is pursuant to the provisions of ORS 183.482 to the Court of Appeals.
2. 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 and the Circuit Court in the county in which you reside.
3. A cause of action under ORS 197.352: A present owner of the property, or any interest therein, may file a cause of action in the Circuit Court for the county where the property is located, if a land use regulation continues to apply to the subject property more than 180 days after the present owner made a written demand for compensation.

(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.”

**BALLOT MEASURE 37 (ORS 197.352)
CLAIM FOR COMPENSATION**

OREGON DEPARTMENT OF LAND CONSERVATION AND DEVELOPMENT

Final Staff Report and Recommendation

March 14, 2006

STATE CLAIM NUMBER: M121857

NAME OF CLAIMANT: John H. Poppe, Sr.

MAILING ADDRESS: 713 Northeast Sandstone Court
Prineville, Oregon 97754

PROPERTY IDENTIFICATION: Township 11S, Range 12E, Section 36
Tax Lot 500
Jefferson County

OTHER INTEREST IN PROPERTY: The John H. Poppe, Sr. Trust

DATE RECEIVED BY DAS: July 21, 2005

180-DAY DEADLINE: June 5, 2006¹

I. CLAIM

John H. Poppe, Sr., the claimant, seeks compensation in the amount of \$100,000 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 build a dwelling on the property. The property does not have an assigned street address but is located in Jefferson 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 Mr. Poppe's establishment of a dwelling: applicable provisions of Statewide Planning Goal 3 (Agricultural Lands), ORS 215 and OAR 660, division 33. These laws will not apply to the claimant only to the extent necessary to allow Mr. Poppe a use of the property

¹ This date reflects 180 days from the date the claim was submitted as extended by the xx days enforcement of Measure 37 was suspended during the pendency of the appeal of Macpherson v. Dep't of Admin. Servs., 340 Or __, 2006 Ore. LEXIS 104 (February 21, 2006).

permitted at the time he acquired it in 1966. (See the complete recommendation in Section VI. of this report.)

III. COMMENTS ON THE CLAIM

Comments Received

On January 4, 2005, pursuant to OAR 125-145-0080 the Oregon Department of Administrative Services (DAS) provided written notice to the owners of surrounding properties.² According to DAS, it received one written comment in response to the 10-day notice.³ The comment does not address whether the claim meets the criteria for relief (compensation or waiver) under ORS 197.352. Comments concerning the effects a use of the property may have on surrounding areas generally are 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 waiving a state law. (See 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 the Measure (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 the Measure (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 21, 2005, for processing under OAR 125, division 145. The claim identifies local ordinances enacted in 1975 as the basis for the claim. Only laws that were enacted prior to December 2, 2004, the effective date of Measure 37 are the basis for this claim. (See citations of statutory and administrative rule history of the Oregon Revised Statutes and Oregon Administrative Rules.)

² This claim, originally filed as #M119150, was withdrawn and has been refiled. The substance of this refiled claim is identical to the original claim. The notice referred to is for the original claim.

³ The 10-day notice period was suspended for 139 days during the pendency of the *Macpherson v. Dep't of Admin. Servs.*, 340 Or __, 2006 Ore. LEXIS 104 (February 21, 2006), which suspended all Measure 37 deadlines.

Conclusions

The claim has been submitted within two years of December 2, 2004; the effective date of Measure 37, based on land use regulations adopted prior to December 2, 2004, and is therefore timely filed.

V. ANALYSIS OF CLAIM

1. Ownership

ORS 197.352 provides 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, John H. Poppe, Sr., acquired the subject property on November 15, 1966, as reflected by an Earnest Money Agreement and verified by copy of a Title Report dated November 30, 1966, included with the claim. The John H. Poppe, Sr. Trust, a revocable living trust established by the claimant, is a current owner of the property. The Trust acquired the subject property from John Poppe, Sr. as evidenced by a Bargain and Sale Deed on October 23, 1992, included with the claim. Transfer of the subject property to a trust is not a change in ownership for purposes of ORS 197.352. John H. Poppe, Sr. is the trustor and trustee of the Trust. A Jefferson County Tax Statement indicates that the John H. Poppe, Sr. Trust is a current owner of the subject property.

Conclusions

John H. Poppe, Sr. is an “owner” of the subject property, as that term is defined by ORS 197.352(11)(C) as of November 15, 1966.

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 asserts that claimant is restricted from constructing a residence on his property, by “Ordinances enacted in 1975.”

The claim is based generally on Jefferson County’s current 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 accord with OAR 660, division 33, and ORS 215 because the claimant’s

property is "Agricultural Land" as defined by Goal 3. 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.

OAR 660, division 33, establishes standards for the approval of farm and non-farm dwellings on EFU zoned land. Specifically, OAR 660-033-0135 requires that, for the approval of a dwelling "customarily provided in conjunction with farm use," the owner must demonstrate, in part, that the owner's farm operation produced \$80,000 gross farm annual income from the sale of farm products in the last two years or three of the last five years. OAR 660-033-0135 became effective on March 1, 1994, and interprets the statutory standard for a primary dwelling in an Exclusive Farm Use (EFU) zone under ORS 215.283(1) (f) (1993).

For a non-farm dwelling, ORS 215.284(4) as applied by OAR 660-033-0130(4) requires, in part, that such a dwelling may only be established on a parcel predominantly composed of Class IV to VIII soils. OAR 660-033-0130(4) became effective on August 7, 1993, and was amended to comply with ORS 215.284(4) on March 1, 1994. (See citations of administrative rule history for OAR 660-033-0130 and 0135.)

John H. Poppe, Sr. acquired the property on November 15, 1966. Jefferson County zoning at that time was A-1, Agricultural District, allowing 1-acre parcels with dwellings permitted as an outright use. The A-1 zone was a qualified farm zone for farm assessment purposes under ORS 215 (1963 edition).

Conclusions

Current land use regulations, particularly ORS 215.284 and applicable provisions of OAR 660, division 33, in accord with Goal 3, restrict the claimant from developing a residence on the property relative to the uses allowed when he acquired an interest in the property.

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. There may be other laws that currently apply to the claimant's use of the 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 what laws apply to a use of 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 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 informal estimate of \$100,000 as the property's estimated reduction in fair market value. This amount is based on the claimant's estimate of the per acre value of the subject property with a dwelling.

Conclusions

As explained in Section V.(1) of this report, the current owner, John H. Poppe, Sr., acquired the property in 1966. Under ORS 197.352, Mr. Poppe is due compensation based on an ownership dating to 1966, for land use laws that restrict the use of the subject property in a manner that reduces the fair market value.

Without an appraisal or other explanation based on the value of a dwelling on the subject property, 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 there has been some reduction in the fair market value of the subject property 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 "ordinances enacted in 1975," that restrict the use of the property, relative to what would have been allowed in 1966 when the property was acquired by John H. Poppe, Sr. The state laws, on which these local ordinances are based, include Statewide Planning Goal 3 (Agricultural Lands), and applicable provisions of ORS 215 and OAR 660, division 33, which Jefferson County has implemented through its EFU zone. With the exception of provisions of ORS 215 in effect on November 15, 1966, these laws are not exempt under ORS 197.352(3)(E). Provisions of ORS 215 adopted before November 15, 1966, are exempt under ORS 197.352(3)(E), which exempts laws in effect when the claimant acquired the property.

Conclusions

Without a specific development proposal for the property, it is not possible for the department to determine what laws 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 does appear that the general statutory, goal and rule restrictions on residential development and use of farm land apply to the claimant's use of the property, and for the most part these laws are not exempt under ORS 197.352(3)(E). Provisions of ORS 215 in effect when the claimant acquired the property in 1966 are exempt under ORS 197.352(3)(E) and will continue to apply to the property.

Other laws in effect when the claimant acquired the property are also 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 what 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. And, 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. The claimant should be aware that the less information he has 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 his 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 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 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 Mr. Poppe's ability to develop a house on his property. The claim asserts the laws enforced by the Commission or department reduce the fair market value of the subject property by \$100,000. However, because the claim does not provide an appraisal or other documentation to establish how the specified restrictions reduce the fair market value of the 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 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 John H. Poppe, Sr., to use the subject property for a use permitted at the time he acquired the property on November 15, 1966.

Conclusion

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 John H. Poppe, Sr.'s development of a single family dwelling on the subject property: applicable provisions of Statewide Planning Goal 3, ORS 215, and OAR 660, division 33, enacted after November 15, 1966. These land use regulations will not apply to Mr. Poppe's use of his property only to the extent necessary to allow the claimant a use permitted at the time he acquired the property on November 15, 1966.
2. The action by the State of Oregon provides the state's authorization to the claimant to use his property subject to the standards in effect on November 15, 1966. On that date, the property was subject to applicable provisions of ORS 215 then in effect.
3. To the extent that any law, order, deed, agreement or other legally-enforceable public or private requirement provides that the 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 ORS 227.160, other permits or authorizations from local, state or federal agencies, and restrictions on the use of the property imposed by private parties.
4. Any use of the 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 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 property by the claimant.

VII. COMMENTS ON THE DRAFT STAFF REPORT

The department issued its draft staff report on this claim on September 13, 2005. 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.