

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. M122011
(BALLOT MEASURE 37) OF)	
James Miller, CLAIMANT)	

Claimant: James Miller (the Claimant)

Property: Township 3S, Range 2W, Section 05, Tax lot 304, Yamhill 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 James Miller's division of the 19-acre property into seven parcels or to his development of a dwelling on each resulting undeveloped parcel: applicable provisions of Goals 3 and 4, ORS 215 and OAR 660, divisions 6, and 33, enacted or adopted after November 1, 1986. These land use regulations will not apply to the claimant only to the extent necessary to allow him to use the subject property for the use described in this report, and only to the extent that use was permitted when he acquired the property on November 1, 1986. The department acknowledges that the relief to which the claimant is entitled under ORS 197.352 will likely not allow the claimant to use the property to the extent desired by the claimant, as described in this report.
2. The action by the State of Oregon provides the state's authorization to the claimant to use the property for the use described in this report, subject to the standards in effect on November 1, 1986. On that date, the property was subject to compliance with Yamhill County's acknowledged EFU zone, and the applicable provisions of ORS 215 and OAR 660, 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 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 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 subject property by the claimant.

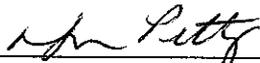
This Order is entered by the Director of the DLCD as a final order of DLCD and the Land Conservation and Development Commission under ORS 197.352, OAR 660-002-0010(8), and OAR 125, division 145, and by the Deputy Administrator for the State Services Division of the DAS as a final order of DAS under ORS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

FOR DLCD AND THE LAND CONSERVATION
AND DEVELOPMENT COMMISSION:



Lane Shetterly, Director
DLCD
Dated this 3rd day of July, 2006.

FOR the DEPARTMENT OF ADMINISTRATIVE
SERVICES:



Dugan Petty, Deputy Administrator
DAS, State Services Division
Dated this 3rd day of July, 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

July 3, 2006

STATE CLAIM NUMBER: M122011

NAME OF CLAIMANT: James Miller

MAILING ADDRESS: PO Box 1045
Newberg, Oregon 97132

PROPERTY IDENTIFICATION: Township 3S, Range 2W, Section 05
Tax lot 304
Yamhill County

OTHER CONTACT INFORMATION: Michael G. Gunn
PO Box 1046
Newberg, Oregon 97132

OTHER INTEREST IN PROPERTY: Joyce Miller (owner, non-claimant)
Nick and Susan Giesch (easement)

DATE RECEIVED BY DAS: August 23, 2005

180-DAY DEADLINE: July 8, 2006¹

I. SUMMARY OF CLAIM

The claimant, James Miller, seeks compensation in the amount of \$1.5 million 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 19-acre property into seven parcels and to develop a dwelling on each resulting undeveloped parcel.² The

¹ This date reflects 180 days from the date the claim was submitted as extended by the 139 days enforcement of Measure 37 was suspended during the pendency of the appeal of *MacPherson v. Dept. of Admin. Svcs.*, 340 Or 117 (2006).

² After notification was provided pursuant to OAR 125-145-0080 on June 14, 2006, the claimant's attorney submitted a letter, dated June 26, 2006, to clarify that, in addition to the desired use as described in this report, the claimant requests that the department waive the subject property's agriculture/forestry zoning and allow the claimant to apply to the county to rezone the property to a rural residential zone, using the zone change criteria in effect when he acquired the property in 1986. Further, in anticipation of the county granting the zone change using the 1986 process, the claimant requests that the provisions of Goal 14 and OAR 660-004-0018 and 660-004-0040 that would apply to the new rural residential zoning be waived as of the date the claimant acquired the property in 1986. ORS 197.352 does not allow what the claimant requests. By its terms, ORS 197.352 does not remove zoning or

subject property is located at 17371 Northeast Slope Lane, near Newberg, in Yamhill 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 James Miller's division of the 19-acre property into seven parcels and to his development of a dwelling on each resulting undeveloped parcel: applicable provisions of Statewide Planning Goals 3 (Agricultural Lands) and 4 (Forest Lands), ORS 215 and Oregon Administrative Rules (OAR) 660, divisions 6, and 33, enacted or adopted after November 1, 1986. These laws will not apply to the claimant only to the extent necessary to allow him to use the subject property for the use described in this report, and only to the extent that use was permitted when he acquired the property on November 1, 1986. The department acknowledges that the relief to which the claimant is entitled under ORS 197.352 will likely not allow the claimant to use the subject property to the extent desired by the claimant, as described in this report. (See the complete recommendation in Section VI of this report.)

III. COMMENTS ON THE CLAIM

Comments Received

On October 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, no written comments, evidence or information were received in response to the 10-day notice.

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

eliminate land use regulations. Rather, it provides that "the governing body responsible for enacting the land use regulation may modify, remove, or not to apply [*sic*] the land use regulations to allow the owner to use the property for a use permitted at the time the owner acquired the property." It does not allow the department to waive laws that would have applied under a different zone, had the claimant applied for and obtained a zone change when he acquired the property. Nor does it allow the department to authorize the claimant to use a county process in effect when he acquired the property to apply for a zone change of the property.

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 23, 2005, for processing under OAR 125, division 145. A supplement to the claim identifies Goals 3 and 4, several provisions of ORS 215 and OAR 660-004-0018 and 660-004-0040 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, James Miller, acquired the subject property on November 1, 1986, as reflected by a contract included with the claim. The Yamhill County Assessor’s Office confirms the claimant’s current ownership of the subject property.

Conclusions

The claimant, James Miller, is an “owner” of the subject property as that term is defined by ORS 197.352(11)(C), as of November 1, 1986.

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 19-acre subject property into seven parcels and to develop a dwelling on each resulting undeveloped parcel. It identifies current state and local land use regulations as not allowing the desired use.³

The claim is based generally on Yamhill County's current Agriculture/Forestry (AF-20) zone and the applicable provisions of state law that require such zoning. The claimant's property is zoned AF-20, which is a mixed agricultural and forest land zone, as required by Goal 4 and the implementing provisions of OAR 660, division 6 (effective on February 5, 1990), subsequently amended on March 1, 1994, to comply with the provisions of House Bill 3661 (Chapter 792, Oregon Laws 1993).

Under OAR 660-006-0050, all the uses permitted under Goals 3 and 4 are allowed in mixed agriculture and forest zones except that for dwellings, either the Goal 3 or 4 standards are applicable based on the predominant use of the tract on January 1, 1993.⁴ Depending on the predominant use on January 1, 1993, the property is subject to either the requirements for dwellings applicable under Exclusive Farm Use (EFU) zoning required by Goal 3 and OAR 660, division 33, or forest zone provisions required by Goal 4 and OAR 660, division 6.

For land divisions, OAR 660-006-0055 authorizes the creation of new parcels based on the standards applicable to farm or forest zones that implement the minimum lot size specified in ORS 215.780. Under ORS 215.780(2)(a), the minimum lot size in Yamhill County's AF-20 zone is 20 acres. The claimant's property cannot be divided into parcels smaller than 20 acres.

The claimant acquired the subject property on November 1, 1986. At that time, the property was subject to Yamhill County's acknowledged AF-20 zone, which generally required a minimum lot or parcel size of 20 acres.⁵ When the claimant acquired the subject property, the desired division and development of the property would have been governed by the county's AF-20 zone and the applicable provisions of ORS 215 then in effect.⁶ In 1986, ORS 215.263 (1985 edition) required

³ The claimant cites OAR 660-004-0018 (Planning and Zoning for Exception Areas) and 660-004-0040 (Application of Goal 14 to Rural Residential Areas) as applicable to this claim, but does not establish how these regulations apply to or restrict the use of the subject property. By their terms, these rules apply only to land for which there is an acknowledged exception to Goal 3 or 4, or both. Yamhill County has not approved such an exception for the subject property. Since these administrative rules do not apply to the subject property, they are not addressed further in this report. Further, as discussed above, ORS 197.352 does not allow the department to waive requirements that do not apply to the property, but which would have applied had the claimant obtained a zone change when the claimant acquired the property when he acquired it.

⁴ No information was provided to the department regarding the predominant use of the subject property on January 1, 1993.

⁵ Yamhill County's AF-20 zone was acknowledged by the Commission for compliance with Goals 3 and 4 on June 12, 1980. The claimant asserts that the subject property was zoned AF-10 (10-acre minimum lot or parcel size) when he acquired it. However, Yamhill County has confirmed that the property was subject to the county's acknowledged AF-20 zone when the claimant acquired the property on November 1, 1986.

⁶ After the county's comprehensive plan and land use regulations were acknowledged by the Commission as complying with the statewide planning goals, the goals and implementing rules no longer applied directly to individual local land use decisions. *Byrd v. Stringer*, 295 Or 311 (1983). However, statutory requirements continue to apply, and insofar as the state and local provisions are materially the same, the local provisions must be

that divisions of land in EFU zones be “appropriate for the continuation of the existing commercial agricultural enterprise within the area” or not smaller than the minimum sized in the county’s acknowledged plan. ORS 215.283(1)(f) (1985 edition) generally allowed farm dwellings “customarily provided in conjunction with farm use.” Non-farm dwellings were allowed under ORS 215.283(3) if they were determined to be compatible with farm use, not interfere seriously with accepted farm practices, not materially alter the stability of the land use pattern in the area and be situated on generally unsuitable land for the production of farm crops and livestock.

No information has been presented in the claim to establish whether the claimant’s desired use of the subject property would have been permitted under the county’s acknowledged plan and the applicable provisions of ORS 215 in effect when the claimant acquired the property.

Conclusions

The current zoning requirements, minimum lot size and dwelling standards established by Goals 3 and 4, ORS 215 and OAR 660, divisions 6, and 33, were enacted or adopted after the claimant acquired the subject property in 1986. However, the claim does not establish whether or to what extent the claimant’s desired use of the subject property complies with the standards under Yamhill County’s acknowledged AF-20 zone and the applicable provisions of ORS 215 in effect when the claimant acquired the property on November 1, 1986. It is unlikely that the extent of the claimant’s desired use could have satisfied the standards in effect when he 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 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 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 the land use regulation(s) (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.”

interpreted consistent with the substance of the goals and implementing rules. *Forster v. Polk County*, 115 Or App 475 (1992) and *Kenagy v. Benton County*, 115 Or App 131 (1992).

Findings of Fact

The claim includes an estimate of \$1.5 million as the reduction in the subject property's fair market value due to the regulations. This amount is based on the claimant's assessment of the subject property's fair market value.

Conclusions

As explained in Section V.(1) of this report, the claimant is James Miller who acquired the subject property on November 1, 1986. Under ORS 197.352, the claimant is due compensation for land use regulations that restrict the use of the subject property and have the effect of reducing its fair market value. Based on the findings and conclusions in Section V.(2) of this report, laws enacted or adopted since the claimant acquired the subject property restrict the claimant's desired use of the property. The claimant estimates that the effect of the regulations on the fair market value of the subject property is a reduction of \$1.5 million.

Without an appraisal or other relevant evidence, and without verification of whether or the extent to which the claimant's desired use of the subject property was allowed under the standards in effect when he acquired the property, it is not possible to substantiate the specific dollar amount by which the land use regulations have reduced the property's fair market value. Nevertheless, based on the evidence in the record for this claim, the department determines 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 Goals 3 and 4, ORS 215 and OAR 660, divisions 6, and 33, which Yamhill County has implemented through its current AF-20 zone. With the exception of amendments to ORS 215 and OAR 660 enacted or adopted after November 1, 1986, these land use regulations were in effect when the claimant acquired the subject property.

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 the general statutory, goal and rule restrictions on the division and development of the subject property are not exempt under ORS 197.352(3)(E) only to the extent they were enacted or adopted after the claimant acquired the property on November 1, 1986. Provisions of

ORS 215 and OAR 660 in effect when the claimant acquired the subject property in 1986 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 subject property are also exempt under ORS 197.352(3)(E) and will also continue to apply to the claimant's use of the property. In addition, the department notes that ORS 215.730 and OAR 660, division 6, include standards for siting dwellings in forest zones. Those provisions include fire protection standards for dwellings. ORS 197.352(3)(B) specifically exempts regulations "restricting or prohibiting activities for the protection of public health and safety, such as fire and building codes. . . ." Accordingly, siting standards for dwellings in forest zones in ORS 215.730 and OAR 660, division 6, are exempt under ORS 197.352(3)(B).

There may be other laws that continue to apply to the claimant's use of the subject 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. 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 subject 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 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 present 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 desired use of the subject property. The claim asserts that existing state land use regulations enforced by the Commission or the department reduce the fair market value of the subject property by \$1.5 million. However, because the claim does not provide an appraisal or other relevant evidence demonstrating that the land use regulations described in Section V.(2) reduce the fair market value of the subject property, a specific amount

of compensation cannot be determined. In order to determine a specific amount of compensation due for this claim, it would also be necessary to verify whether or the extent to which the claimant's desired use of the property was allowed under the standards in effect when he acquired the property. Nevertheless, based on the record for this claim, the department has determined that the laws on which the claim is based 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 James Miller to use the subject property for a use permitted at the time he acquired the property on November 1, 1986.

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 James Miller's division of the 19-acre property into seven parcels or to his development of a dwelling on each resulting undeveloped parcel: applicable provisions of Goals 3 and 4, ORS 215 and OAR 660, divisions 6, and 33, enacted or adopted after November 1, 1986. These land use regulations will not apply to the claimant only to the extent necessary to allow him to use the subject property for the use described in this report, and only to the extent that use was permitted when he acquired the property on November 1, 1986. The department acknowledges that the relief to which the claimant is entitled under ORS 197.352 will likely not allow the claimant to use the property to the extent desired by the claimant, as described in this report.
2. The action by the State of Oregon provides the state's authorization to the claimant to use the property for the use described in this report, subject to the standards in effect on November 1, 1986. On that date, the property was subject to compliance with Yamhill County's acknowledged EFU zone, and the applicable provisions of ORS 215 and OAR 660, 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 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 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 subject property by the claimant.

VII. COMMENTS ON THE DRAFT STAFF REPORT

The department issued its draft staff report on this claim on June 14, 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