

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 122219
(BALLOT MEASURE 37) OF)
J. Allen Ehl and Joanne Ehl, CLAIMANTS)

Claimants: J. Allen Ehl and Joanne Ehl (the Claimants)

Property: Township 1N, Range 10E, Section 21, Tax lot 1000, Hood River County
(the property)

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

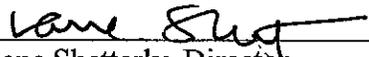
Claimants submitted the Claim to the State of Oregon under ORS 197.352. Under OAR 125-145-0010 *et seq.*, the Department of Administrative Services (DAS) referred the Claim to the Department of Land Conservation and Development (DLCD) as the regulating entity. This order is based on the record herein,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

ORDER

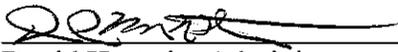
The Claim is denied as to laws administered by DLCD and the Land Conservation and Development Commission (LCDC) for the reasons set forth in the DLCD Report.

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

FOR DLCD AND THE LAND
CONSERVATION AND DEVELOPMENT
COMMISSION:


Lane Shetterly, Director
DLCD
Dated this 18th day of July, 2006.

FOR the DEPARTMENT OF
ADMINISTRATIVE SERVICES:


David Hartwig, Administrator
DAS, State Services Division
Dated this 18th day of July, 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**

July 18, 2006

STATE CLAIM NUMBER: M122219

NAMES OF CLAIMANTS: J. Allen Ehl
Joanne Ehl

MAILING ADDRESS: 4390 Leasure Drive
Mt. Hood Parkdale, Oregon 97041

PROPERTY IDENTIFICATION: Township 1N, Range 10E, Section 21
Tax lot 1000
Hood River County

OTHER CONTACT INFORMATION: Louis Grossman (Attorney)
Van Valkenburgh & Associates, PC
204 East 4th Street
The Dalles, Oregon 97058

DATE RECEIVED BY DAS: September 7, 2005

180-DAY DEADLINE: July 23, 2006¹

I. SUMMARY OF CLAIM

The claimants, J. Allen Ehl and Joanne Ehl, seek compensation in the amount of \$2.5 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 claimants desire compensation or the right to divide the 19.32-acre property into five approximately 4-acre parcels and to develop a dwelling on each parcel. The subject property is located at 4390 Leasure Drive, near Mt. Hood Parkdale, in Hood River 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 claimants' desired use of the subject property was prohibited under the laws in effect when the claimants acquired the property in 2003. (See the complete recommendation in Section VI. of this report.)

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).

III. COMMENTS ON THE CLAIM

Comments Received

On October 11, 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 September 7, 2005, for processing under OAR 125, division 145. The claim identifies Hood River County Exclusive Farm Use (EFU) zoning and provisions of ORS 197 and 215 and OAR 660 as the basis for the claim. Only laws that were enacted 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 claimants, J. Allen Ehl and Joanne Ehl, initially acquired the subject property on August 17, 1977, as reflected by a warranty deed included with the claim. On December 22, 1988, they conveyed the subject property to the J. Allen Ehl Qualified Personal Residence Trust on December 22, 1998, with J. Allen Ehl as the “settlor” and Joanne C. Ehl as the trustee. Article IX on page 12 of the trust document establishes that the trust is irrevocable. The claimants acquired the subject property again on July 15, 2003, as reflected by a quitclaim deed that documents their acquisition of the property from the irrevocable trust. Conveyance of property to and from an irrevocable trust constitutes a change in ownership for the purposes of ORS 197.352. The Hood River County Assessor’s Office confirms the claimants’ current ownership of the subject property.

Conclusions

The claimants, J. Allen Ehl and Joanne Ehl, are “owners” of the subject property as that term is defined by ORS 197.352(11)(C), as of July 15, 2003. The J. Allen Ehl Qualified Personal Residence Trust is a “family member” of the claimants, as that term is defined in ORS 197.352(11)(A), as of December 22, 1988.²

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 claimants’ 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 claimants or a family member acquired the property.

Findings of Fact

The claim indicates that Hood River County’s EFU zoning and provisions of ORS 197 and 215 and OAR 660 prevent the claimants from dividing the 19.32-acre subject property into five approximately 4-acre parcels and developing a dwelling on each parcel.

² Under the language of ORS 197.352(11)(A), a legal entity previously owned by individuals who are present owners can be a family member of the present owners of the property. However, under the language of the statute, the legal entity cannot have family members. Therefore, the individuals who conveyed property into a separate legal entity are not “family members” of the present owners who then later acquired the property from that separate legal entity.

The claim is based on Hood River County's current EFU zone and the applicable provisions of state law that require such zoning. The claimants' property is zoned EFU as required by Statewide Planning Goal 3 (Agricultural Lands), in accordance with ORS 215 and OAR 660, division 33, because the claimants' property is "agricultural land" as defined by Goal 3. Goal 3 became effective on January 25, 1975.

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 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 Commission subsequently adopted amendments to comply with House Bill (HB) 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 and 660-033-0130.) Pursuant to HB 3326, these rules expanded the Commission's authority to allow the partition of EFU-zoned property into lots or parcels smaller than the minimum size established under ORS 215.780 for the purpose of siting non-farm dwellings.

The claimants' family member acquired the subject property on December 22, 1998, and the claimants acquired it on July 15, 2003. On those dates, the property was subject to the laws in effect, as described above.

Conclusions

The current zoning requirements, minimum lot size and dwelling standards established by Goal 3 and provisions applicable to land zoned EFU in ORS 215 and OAR 660, division 33, were all enacted or adopted before claimants and their family member acquired the subject property on December 22, 1988, and July 15, 2003. These land use regulations do not allow the desired division of the 19.32-acre subject property into five approximately 4-acre parcels and the development of a dwelling on each parcel. Laws enacted or adopted since the claimants and their family member acquired the subject property in 1998 and 2003 do not restrict the claimants' desired use of the property relative to when the claimants and their family member acquired it.

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."

Findings of Fact

The claim includes an estimate of \$2.5 million as the reduction in the subject property's fair market value due to the regulations that restrict the use of the property. This amount is based on a list of comparable properties.

Conclusions

As explained in Section V.(1) of this report, the claimants are J. Allen Ehl and Joanne Ehl who acquired the subject property on July 15, 2003, and whose family member acquired it on December 22, 1988. No state laws enacted or adopted since the claimants and their family member acquired the subject property restrict the use of the property relative to the uses allowed in 1998 and 2003. 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(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 Hood River County has implemented through its current EFU zone. As set forth in Section V.(2) of this report, all of the state land use regulations restricting the claimants' desired use of the subject property were in effect when the claimants and their family member acquired the property in 1998 and 2003.

Conclusions

All of the state land use regulations that restrict the claimants' desired use of the subject property were in effect when the claimants and their family member acquired the property. Therefore, these state land use regulations are exempt under ORS 197.352(3)(E), which exempts laws in effect when the claimants 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 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 do not restrict the claimants' desired use of the subject property relative to what was permitted when the claimants acquired it in 2003 and do not reduce the fair market value of the property. All 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 claimants have not established that they are 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 June 28, 2006. OAR 125-145-0100(3), provided an opportunity for the claimants or the claimants' 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.