

ORS 197.352 (BALLOT MEASURE 37) CLAIM FOR COMPENSATION
OREGON DEPARTMENT OF LAND CONSERVATION AND DEVELOPMENT
Proposed Amended Final Staff Report and Recommendation¹

October 12, 2006

STATE CLAIM NUMBERS: M122097 and M122098

NAMES OF CLAIMANTS: C. Hoyt and Phyllis Jarrell

MAILING ADDRESS: 15815 Northeast 40th Street
Vancouver, Washington 98682

PROPERTY IDENTIFICATION: Township 01N, Range 04W, Section 09
Tax lots 500 and 501
Washington County

DATE RECEIVED BY DAS: August 29, 2005

180-DAY DEADLINE: July 14, 2006²

I. SUMMARY OF CLAIM

The claimants, C. Hoyt and Phyllis Jarrell, seek compensation in the amount of \$4,585,000 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 claimants desire compensation or the right to divide the 72.74-acre property into one-acre parcels and to develop a dwelling on each parcel³. The subject property is located on the south side of Northwest Clapshaw Hill Road approximately 1,300 feet east of the intersection with Northwest Hillside Road, in Washington County. (See claim.)

II. SUMMARY OF STAFF RECOMMENDATION

Based on the preliminary findings and conclusions set forth below, the Department of Land Conservation and Development (the department) has determined that the claims are not valid because the claimants' desired use of the subject property was prohibited under the laws in effect

¹ After the final order and report for this claim was issued on July 7, 2006 (pursuant to OAR 125-145-0080), the department received a letter dated August 30, 2006. Included with the letter was documentation that subsequent to their original acquisition of the property, the claimants conveyed and reacquired the property on two occasions. Documentation of those conveyances was not in the department's record when it and the Department of Administrative Services (DAS) issued the state's order on this claim. Based on the new documentation, the department and DAS are proposing to withdraw the final order and report, and issue an amended final order and report.

² This date reflects 180 days from the date the claims were submitted, as extended by the 139 days that all timelines under Measure 37 were suspended during the pendency of *MacPherson v. Department of Administrative Services*, 340 Or 117 (2006).

³ The claimants submitted a separate claim for relief under ORS 197.352 for each of the two subject tax lots. Those claims are consolidated for this review. Tax lot 500 consists of 31.58 acres, and tax lot 501 consists of 41.16 acres.

when the claimants acquired the property in 2004. (See the complete recommendation in Section VI. of this report.).

III. COMMENTS ON THE CLAIM

Comments Received

On August 31, 2005, pursuant to OAR 125-145-0080, the Oregon Department of Administrative Services (DAS) provided written notice to the owners of surrounding properties.⁴ According to DAS, one written comment was received in response to the 10-day notice.

The comment on the draft report did not address whether the claims meet 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 letter in the department's claim file.)

The department is accepting additional comments on this proposed amended order and report. Persons receiving this proposed amended report who wish to comment on it must submit comments in writing. The details of where to send the comments and when they must be received by are set forth at the end of this proposed amended report.

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.

⁴ Following issuance of the final report and order on July 14, 2006, the department learned that notification had not been provided to some owners of surrounding properties entitled to notice pursuant to OAR 125-145-0080. The ownership information upon which this proposed amended report is based was received by individuals who were entitled to, but did not receive, notice of the claim. This proposed amended report is being provided to all persons entitled to notice under OAR 125-145-0080, including the claimants.

Findings of Fact

The claims were submitted to DAS on August 29, 2005, for processing under OAR 125, division 145. The claims identify the Washington County Comprehensive Plan, applicable provisions of Washington County zoning codes and House Bill 3661 as the basis for the claims. Only laws that were enacted or adopted prior to December 2, 2004, are the basis for the claims.

Conclusions

These claims have 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 are 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, C. Hoyt and Phyllis Jarrell, first acquired tax lot 500 on January 31, 1967, and tax lot 501 on August 7, 1967, as reflected by a memorandum of contract for each tax lot provided by the Washington County Land Use and Transportation Planning Division. On April 12, 1994, the claimants conveyed fee title to the subject property to Agness Pauline Hickman, as trustee under two trusts. Under the express terms of those conveyances, the only right retained by the claimants was a personal property right to earnings and proceeds arising from the sale or other disposition of the real property, and they retained no legal or equitable title or right to use the property. On June 3, 1994, the claimants reacquired the property by deeds from Agness Pauline Hickman, acting as trustee of the trusts. On June 14, 1994, the claimants conveyed the subject property to James C. and Ellen K. Woodard, as reflected by a memorandum of land sale contract. On June 22, 2004 the claimants filed an Affidavit of Declaration of Forfeiture of Land Sale Contract. Under ORS 93.930, the claimants acquired the rights of possession of the property on July 2, 2004. The Washington County Assessor’s Office confirms the claimants’ current ownership of the subject property.

Conclusions

The claimants, C. Hoyt and Phyllis Jarrell, are “owners” of the subject property as that term is defined by ORS 197.352(11)(C), as of July 2, 2004.

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 claims indicate that the claimants desire to divide the 72.74-acre property into one-acre parcels and to develop a dwelling on each parcel. The claims identify the Washington County Comprehensive Plan and zoning code and House Bill 3661 as restricting that desired use.

The claims are based generally on Washington County's current Exclusive Farm Use (EFU) zone and the applicable provisions of state law that require such zoning. The claimants' property is zoned EFU as required by Goal 3, in accordance with ORS 215 and OAR 660, division 33, because the claimants' property is "agricultural land" as defined by Goal 3.⁵ 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) (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 claimants acquired the subject property on July 2, 2004. At that time, it was zoned EFU by Washington County and subject to the current lot size and dwelling standards under Goal 3, ORS 215 and OAR 660, division 33.

Conclusions

The current zoning requirements, minimum lot size and dwelling standards established by applicable provisions of Goal 3, ORS 215 and OAR 660, division 33, were all enacted or adopted before claimants, C. Hoyt and Phyllis Jarrell, acquired the subject property on July 2, 2004. These land use regulations do not allow the desired use of the subject property. Laws

⁵ The claimants' property is "agricultural land" because it contains Natural Resources Conservation Service Class I-IV soils.

enacted or adopted since the claimants acquired the subject property in 2004 do not restrict the claimants' desired use of the property relative to when the claimants acquired it in 2004.

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 claims include an estimate of \$4,585,000 as the reduction in the subject property's fair market value due to the regulations that restrict the claimants' desired use of the property. This amount is based on comparable property values in the surrounding area.

Conclusions

As explained in Section V.(1) of this report, C. Hoyt and Phyllis Jarrell are the claimants. They acquired the subject property on July 2, 2004. No state laws enacted or adopted since the claimants acquired the subject property restrict the use of the property relative to the uses allowed in 2004. 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 claims do not identify any state land use regulations enacted or adopted since the claimants acquired the subject property that restrict the use of the property relative to what would have been allowed when they acquired it on July 2, 2004. As set forth in Section V.(2) of this report, the state land use regulations restricting the claimants' desired use of the subject property were in effect when the claimants acquired the property in 2004.

Conclusions

All of the state land use regulations that restrict the claimants' desired use of the subject property were in effect when the claimants 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 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 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 2004 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. NOTICE OF OPPORTUNITY TO COMMENT

This proposed amendment report is not a final decision by the department and does not authorize any use of the property. The claimants, the claimants' authorized agent (if any) and other persons receiving this proposed amended report may submit written comments, evidence and information in response to the report. Such responses must be made in writing, and must be received no more than 14 calendar days after the date this report is mailed, in order to assure that they are considered by the department. All responses must be delivered to the Oregon Department of Administrative Services (DAS), Measure 37 Unit, Risk Management, State Services Division, 1225 Ferry Street SE, U160, Salem Oregon 97301-4292. Responses are timely if they are either postmarked on the 14th day, or actually delivered to DAS by the close of business on the 14th day. Note: Please reference the claim number, claimant name, and clearly mark your comments as "Proposed Amended Order comments." Comments must be submitted in writing to be considered.