

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 122728
(BALLOT MEASURE 37) OF)
Cecelia L. Hunziker, CLAIMANT)

Claimant: Cecelia L. Hunziker (the Claimant)

Property: Township 1N, Range 1W, Section 09, Tax lot 300, Multnomah 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 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 Deputy 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 Deputy 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:

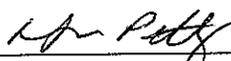
Lane Shetterly, Director



Cora R. Parker, Deputy Director
DLCD

Dated this 24th day of August, 2006.

FOR the DEPARTMENT OF
ADMINISTRATIVE SERVICES:



Dugan Petty, Deputy Administrator
DAS, State Services Division

Dated this 24th day of August, 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

August 24, 2006

STATE CLAIM NUMBER: M122728

NAME OF CLAIMANT: Cecelia L. Hunziker

MAILING ADDRESS: 4840 Penns Valley Road
Spring Mills, Pennsylvania 16875

PROPERTY IDENTIFICATION: Township 1N, Range 1W, Section 09
Tax lot 300
Multnomah County

OTHER CONTACT INFORMATION: Alfred Nordgren
14350 Stenbock Road NE
Aurora, Oregon 97002

John C. Pinkstaff
Ramis Crew Corrigan, LLP
1727 Northwest Hoyt Street
Portland, Oregon 97209

DATE RECEIVED BY DAS: October 11, 2005

180-DAY DEADLINE: August 26, 2006¹

I. SUMMARY OF CLAIM

The claimant, Cecelia Hunziker, seeks compensation in the amount of \$1,382,400 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 25.13-acre subject property into five-acre parcels and to develop a dwelling on each parcel. The subject property is located at 13715 Northwest Germantown Road, near Portland, in Multnomah County. (See claim.)

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).

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 claimant's desired use of the subject property was prohibited under the laws in effect when the claimant acquired the property in 2002. (See the complete recommendation in Section VI. of this report.)

III. COMMENTS ON THE CLAIM

Comments Received

On June 8, 2006, pursuant to Oregon Administrative Rules (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 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
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 October 11, 2005, for processing under OAR 125, division 145. The claim identifies provisions of OAR 660, divisions 4, 16, and 23, and provisions of Multnomah County's zoning code 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, Cecelia Hunziker, acquired the subject property on November 7, 2002, as reflected by a statutory special warranty deed provided by a title search.² A September 14, 2005, title report submitted with the claim establishes the claimant’s current ownership of the subject property.

Conclusions

The claimant, Cecelia Hunziker, is an “owner” of the subject property as that term is defined by ORS 197.352(11)(C), as of November 7, 2002.

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 25.13-acre subject property into five-acre parcels and to develop a dwelling on each parcel, and that the desired use is not allowed under current land use regulations.³

² The claimant asserts an acquisition date of December 31, 1989, when Wesley Horace Wiseman and Fern Cecelia Wiseman entered into a land sale contract with the claimant. Normally, a vendee’s interest in a land sale contract would be a sufficient basis for a claim. However, in this case, under the land sale contract, Wesley Horace Wiseman and Fern Cecelia Wiseman retained a life estate interest in the subject property with the exclusive right to use the property during the duration of their life estates. As a result, although the claimant acquired a right to use the subject property in the future through the land sale contract, that right did not include a present right to use the property since it was subject to Wesley Horace and Fern Cecelia Wiseman’s life estate. Therefore, the claimant did not have a right to use the subject property that was restricted by land use regulations until the claimant acquired fee title on November 7, 2002.

³ The claimant summarily cites numerous state land use laws including “any other state or county regulations, including but not limited to state statutes, statewide planning goals, and administrative rules adopted since the date of acquisition that restrict the use or value of the property” as applicable to this claim, but does not establish how the laws either apply to the claimant’s desired use of the subject property or restrict its use with the effect of reducing its fair market value. On their face, most of the regulations either do not apply to the claimant’s property or do not restrict use of the claimant’s property in a manner that reduces its fair market value. This report addresses only those regulations that the department finds are applicable to and restrict the claimant’s use of the subject property, based on the claimant’s asserted desired use.

The claim is based on Multnomah County's current Rural Residential (RR) zone and the applicable provisions of state law that require such zoning. The claimant's property is zoned RR as required by Statewide Planning Goal 14 (Urbanization), which generally requires that land outside of urban growth boundaries be used for rural uses.

Goal 14 was effective on January 25, 1975, and requires that local comprehensive plans identify and separate urbanizable land from rural land in order to provide for an orderly and efficient transition from rural to urban land use. In 2000, as a result of a 1986 Oregon Supreme Court decision,⁴ the Commission amended Goal 14 and adopted OAR 660-004-0040 (Application of Goal 14 to Rural Residential Areas), which was effective on October 4, 2000. For rural residential properties less than one mile of the urban growth boundary for the Portland metropolitan area, the rule states that the minimum area for any new lot or parcel shall be 20 acres (OAR 660-004-0040(8)(e)).⁵ The subject property is located within one mile of the urban growth boundary for the Portland metropolitan area and is, therefore, subject to the 20-acre minimum lot size standard under OAR 660-004-0040(8)(e).

The claimant also cites OAR 660, divisions 16, and 23, relating to Goal 5 (Natural Resources), as restricting the desired use. Goal 5 became effective on January 25, 1975, and required that habitat lands as defined by the Goal be zoned for habitat protection pursuant to ORS 215. The administrative rule implementing Goal 5 and OAR 660, division 16, became effective on May 18, 1981. OAR 660, division 23 (Procedures and Requirements for Complying with Goal 5, including Section 0110, Wildlife Habitat), became effective on September 1, 1996. Goal 5 requires the inventory of significant natural resources and their protection through appropriate zoning. Goal 5 does not, however, impose specific criteria or limitations on the use of individual parcels of land. The Goal rather requires the city to consider appropriate protection of natural resources considering economic, social and energy consequences of allowing development.

The claimant acquired the subject property on November 7, 2002, after all of these land use regulations were in effect.

Conclusions

The minimum lot size requirements for rural residential lots or parcels established by Goal 14 and OAR 660-004-0040, and the provisions of Goal 5 that could be construed to be applicable to the claimant's property were all adopted before the claimant, Cecelia Hunziker, acquired the subject property on November 7, 2002. These land use regulations do not allow the claimant's desired use of the subject property. Laws enacted or adopted since the claimant acquired the subject property in 2002 do not restrict the claimant's desired use of the property relative to when the claimant acquired it in 2002.

⁴ *1000 Friends of Oregon v. LCDC (Curry County)*, 301 Or 447 (1986).

⁵ The Portland metropolitan service area does not have an urban reserve area acknowledged to comply with OAR 660, division 21. Therefore, the provisions under OAR 660-004-0040(d) exempting lots or parcels from the 20-acre standard do not apply.

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 \$1,382,400 as the reduction in the subject property’s fair market value due to the regulations that restrict the claimant’s desired use of the property. This amount is based on the claimant’s comparison of the subject property’s assessed value and a 2005 option agreement and a purchase and sale agreement to the assessed value of adjacent properties.

Conclusions

As explained in Section V.(1) of this report, the claimant, Cecelia Hunziker, acquired the subject property on November 7, 2002. No state laws enacted or adopted since the claimant acquired the subject property restrict the use of the property relative to the uses allowed in 2002. Therefore, the fair market value of the subject property has not been reduced as a result of land use regulations enforced by the Land Conservation and Development Commission (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 Goal 14 and OAR 660-004-0040, which Multnomah County has implemented through its RR zone. All of these regulations were in effect when the claimant acquired the property on November 7, 2002.

Conclusions

All of the state land use regulations that restrict the claimant’s desired use of the subject property were in effect when the claimant acquired the property. Therefore, these state land use regulations are exempt under ORS 197.352(3)(E), which exempts laws in effect when the claimant 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 claimant's desired use of the subject property relative to what was permitted when the claimant acquired it in 2002 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 claimant has not established that she is 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 August 3, 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.