

BEFORE THE DEPARTMENT OF ADMINISTRATIVE SERVICES,
THE DEPARTMENT OF LAND CONSERVATION AND DEVELOPMENT,
THE BOARD AND DEPARTMENT OF FORESTRY, AND
THE DEPARTMENT OF TRANSPORTATION
OF THE STATE OF OREGON

IN THE MATTER OF THE CLAIM FOR) FINAL ORDER
COMPENSATION UNDER ORS 197.352) CLAIM NO. M124347
(BALLOT MEASURE 37) OF)
Lazy H Ranch, LLC, Bob L. Hemstreet, manager of)
Lazy H Ranch, LLC and co-trustee of the Bob L. and)
Mary J. Hemstreet Joint Revocable Trust, CLAIMANTS)

Claimants: Lazy H Ranch, LLC, Bob L. Hemstreet, manager of Lazy H Ranch, LLC and
co-trustee of the Bob L. and Mary J. Hemstreet Joint Revocable Trust
(the Claimants)

Property: Township 4S, Range 6W, Section 22, Tax lots 600 and 601
Township 4S, Range 6W, Section 23, Tax lots 500, 700 and 1000
Township 4S, Range 6W, Section 26, Tax lots 200, 300, 400, 500, 600,
790 and 800
Township 4S, Range 6W, Section 27, Tax lots 100 and 1705
Yamhill 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.

The Claim is denied as to laws administered by the Oregon Department of Forestry or the Oregon Board of Forestry, for the reasons set forth in the ODF Report.

The Claim is denied as to laws administered by Department of Transportation for the reasons set forth in the ODOT Report.

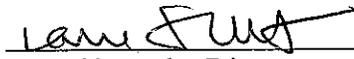
This Order is entered by the Director of the DLCD as a final order of DLCD and the Land Conservation and Development Commission under ORS 197.352, OAR 660-002-0010(8), and

OAR 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 125, division 145, and ORS 293.

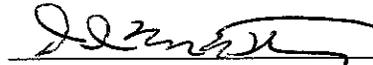
This Order is entered by the Oregon Board and Department of Forestry as a final order of the Board under ORS 197.352, OAR 629-001-0057, and OAR Chapter 125, division 145.

This Order is entered by the Department of Transportation as a final order under Measure 37 and OAR Chapter 125, division 145.

FOR DLCD AND THE LAND
CONSERVATION AND
DEVELOPMENT COMMISSION:


Lane Shetterly, Director
DLCD
Dated this 6th day of September, 2006.

FOR the DEPARTMENT OF
ADMINISTRATIVE SERVICES:

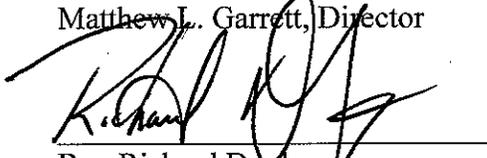

David Hartwig, Administrator
DAS, State Services Division
Dated this 6th day of September, 2006.

FOR THE OREGON BOARD OF
FORESTRY AND THE OREGON
DEPARTMENT OF FORESTRY:


Marvin Brown, State Forester
ODF
Dated this 6th day of September, 2006.

FOR OREGON DEPARTMENT OF
TRANSPORTATION

Matthew L. Garrett, Director


By: Richard Dunlap
Acting State Right of Way Manager
Oregon Department of Transportation
Dated this 6th day of September, 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 197.352, 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.”

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

September 6, 2006

STATE CLAIM NUMBER: M124347

NAMES OF CLAIMANTS: Lazy H Ranch, LLC
Bob L. Hemstreet, manager of Lazy H Ranch, LLC and co-trustee of the Bob L. and Mary J. Hemstreet Joint Revocable Trust

MAILING ADDRESS: 28880 Southwest Thomson Mill Road
Sheridan, Oregon 97378

PROPERTY IDENTIFICATION: Township 4S, Range 6W, Section 22
Tax lots 600 and 601
Township 4S, Range 6W, Section 23
Tax lots 500, 700 and 1000
Township 4S, Range 6W, Section 26
Tax lots 200, 300, 400, 500, 600, 790 and 800
Township 4S, Range 6W, Section 27
Tax lots 100 and 1705
Yamhill County

OTHER CONTACT INFORMATION: Joseph T. Hagan
Hagen O'Connell, LLP
121 Southwest Morrison, Suite 1500
Portland, Oregon 97204

OTHER INTEREST IN PROPERTY: Mary J. Hemstreet, Jon D. Hemstreet, Billie Hemstreet Stevens and Jodie Hemstreet Lanier¹

DATE RECEIVED BY DAS: March 14, 2006

180-DAY DEADLINE: September 10, 2006

¹ The claim identifies Mary J. Hemstreet as a co-trustee of the Bob L. and Mary J. Hemstreet Revocable Living Trust and as having interest in Lazy H Ranch, LLC. It also identifies Jon D. Hemstreet, Billie Hemstreet Stevens and Jodie Hemstreet Lanier as each having an interest in Lazy H Ranch, LLC. None of these persons are identified as claimants.

I. SUMMARY OF CLAIM

The claimants, Lazy H Ranch, LLC (hereafter the LLC claimant) and Bob L. Hemstreet, manager of the LLC and co-trustee of the Bob L. and Mary J. Hemstreet Joint Revocable Trust (hereafter Mr. Hemstreet), seek compensation in the amount of \$35,074,244 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 851.18-acre subject property into 283 parcels of one to three acres and to develop a dwelling on each parcel. The subject property is located at 28880 SW Thomson Mill Road, north of Sheridan, 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 not valid. The claim is not valid as to Mr. Hemstreet because he is not a present owner of an interest in the property that has been restricted, either as the manager of the LLC claimant or as co-trustee of the revocable trust. The claim is not valid as to the LLC claimant because its desired use of the subject property was prohibited under the laws in effect when it acquired the property in 1997. (See the complete recommendation in Section VI of this report.)

III. COMMENTS ON THE CLAIM

Comments Received

On July 11, 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, two written comments 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 March 14, 2006, for processing under OAR 125, division 145. The claim identifies certain Yamhill County code provisions, Statewide Planning Goals 3 (Agricultural Lands), 4 (Forest Lands) and 11 (Public Facilities and Services), ORS 92.010 to 92.190 and 197.225 to 197.250 and provisions of ORS 215 and OAR 660 as restricting the claimants' desired use of the subject property.² 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 LLC claimant acquired the subject property on December 23, 1997, as reflected by a deed included with the claim. Mr. Hemstreet is not a present owner of the subject property because the LLC claimant acquired a fee simple title on December 23, 1977, and Mr. Hemstreet no longer owns any real property interest in the subject property. The Yamhill County staff report on a Measure 37 claim the claimants filed with the county confirms that the LLC claimant is the current owner of the subject property, as do records from the county assessor.

Conclusions

The LLC claimant is an "owner" of the subject property as that term is defined by ORS 197.352(11)(C), as of December 23, 1997.³

Although a corporate entity may be a "family member" of an owner as that term is defined by ORS 197.352(11)(A), an "owner" that is a corporate entity does not have individual "family

² The claim lists other state laws that are not administered by the department. The Department of Forestry (ODF) and the Department of Transportation (ODOT) are preparing reports addressing those state laws.

³ Lazy H Ranch, LLC is a domestic limited liability company registered with the Oregon Secretary of State.

members” under ORS 197.352(11)(A). Therefore, none of the individuals who transferred the subject property to the LLC claimant can be considered a “family member” of the LLC claimant.

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 the LLC claimant’s desired use of the 851.18-acre subject property is to divide it into up to 283 parcels of one to three acres each, and to develop a dwelling on each parcel. According to the claim, Goals 3, 4 and 11, ORS 92.010 to 92.190 and 197.225 to 197.250 and provisions of ORS 215, OAR 660, divisions 6, 14, 15, 22, and 33, and OAR 629 restrict the desired use.⁴

The claim does not establish how Goal 11 and provisions of ORS 92 and 197 and OAR 660, divisions 14, 15 (except Goals 3, 4 and 14) and 22, and OAR 629 either apply to the claimants’ desired use of the subject property or restrict the use of the property so as to reduce its fair market value. To the extent that any of these provisions could be construed as applying to or restricting the use of the subject property, these provisions were in effect when the LLC claimant acquired the property and therefore, do not restrict the LLC claimant’s desired use of the property.

The claim is based on the applicable state laws that require Yamhill County’s current F-80 Forestry and AF-80 Agriculture/Forest zoning of the property. The claimants’ property is zoned F-80 and AF-80 as required by Goal 3 (Agricultural Lands) and Goal 4 (Forest land), in accordance with ORS 215 and OAR 660, divisions 6, and 33, because the claimants’ property is “agricultural land” as defined by Goal 3 and “forest land” as defined by Goal 4. Goals 3 and 4 became effective on January 25, 1975, and required that agricultural lands, as defined by Goal 3, be zoned exclusive farm use pursuant to ORS 215 and forest land, as defined by Goal 4, be zoned for forest use pursuant to Goal 4 and OAR 660, division 6.

The current zoning requirements, minimum lot size and dwelling standards established by Goals 3, 4 and 14, and applicable provisions of ORS 215 and OAR 660, divisions 6, and 33, were all in effect when the LLC claimant acquired the subject property on December 23, 1997. These land use regulations do not allow the desired use of the subject property. Laws enacted or adopted since the claimants acquired the subject property in 1997 do not restrict the claimants’ desired use of the property relative to when the LLC claimant acquired it in 1997. The claimants have not identified any specific state land use regulation that applies to the desired use of the property that took effect after December 23, 1997. As a result, the department has no basis for approving this claim.

Conclusions

No state land use regulation administered by the department restricts rights to use the subject property that the LLC claimant had when it acquired the property on December 23, 1997.

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 \$35,074,244 as the reduction in the subject property’s fair market value due to the regulations that restrict the LLC claimant’s desired use of the property. This amount is based on the high-end of a range of loss of fair market value identified in the claim, between \$10,779,644 and \$38,303,100, based on comparable properties in the area and the fair market value of the subject property developed into either one- or three-acre residential parcels, minus the assessor’s fair market value of \$3,228,856 for the property.

As found in the preceding section, the LLC claimant did not have the right to divide the subject property into one- to three-acre parcels and establish a home on each parcel when the LLC claimant acquired the property in 1997. As a result, the LLC claimant’s evidence as to the fair market value is not relevant, and there is no evidence in the record for this claim that any of the identified state land use regulations have had the effect of reducing the fair market value of the subject property.

Conclusions

The fair market value of the subject property has not been reduced as a result of land use regulations enforced by the Land Use 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 does not identify any state land use regulations enacted or adopted since the LLC claimant acquired the subject property that restrict the use of the property relative to what would have been allowed when it acquired the property on December 23, 1997. 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 LLC claimant acquired the property in 1997.

Conclusions

All of the state land use regulations that restrict the LLC claimant's desired use of the subject property were in effect when it acquired the property. Therefore, these state land use regulations are exempt under ORS 197.352(3)(E), which exempts laws in effect when the LLC 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 LLC claimant's desired use of the subject property relative to what was permitted when it acquired the property in 1997 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). Mr. Hemstreet is not an owner of the subject real property and as a result, is not entitled to relief under ORS 197.352.

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 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 18, 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.

ORS 197.352 (BALLOT MEASURE 37) CLAIM FOR COMPENSATION

OREGON DEPARTMENT OF FORESTRY

Final Staff Report and Decision
September 6, 2006

STATE CLAIM NUMBER: M 124347

NAMES OF CLAIMANTS: **Lazy H Ranch, LLC and Bob L. Hemstreet, Manager and Bob L. Hemstreet, Co-Trustee of the Bob L. and Mary J. Hemstreet Joint Revocable Trust**

MAILING ADDRESS: 28880 Thomson Mill Rd.
Sheridan, Oregon 97378

IDENTIFICATION OF PROPERTY: **Township 4S, Range 6W, Section 22
Tax lots 600 and 601
Township 4S, Range 6W, Section 23
Tax lots 500, 700 and 1000
Township 4S, Range 6W, Section 26
Tax lots 200, 300, 400, 500, 600, 790 and 800
Township 4S, Range 6W, Section 27
Tax lots 100 and 1705
Yamhill County**

OTHER CONTACT INFO: Bob L. and Mary J. Hemstreet
28880 Thomson Mill Rd.
Sheridan, Oregon 97378

Joseph T. Hagen
Hagen O'Connell LLP
121 SW Morrison, Ste. 1500
Portland, OR 97204

DATE RECEIVED BY DAS: March 14, 2006

180-DAY DEADLINE: September 10, 2006

I. SUMMARY OF CLAIM

See Department of Land Conservation and Development (DLCD) Final Staff Report.

II. SUMMARY OF STAFF RECOMMENDATION

Based on the findings and conclusions set forth below, the Department of Forestry (ODF) has determined the claim is not valid as to land use regulations administered by ODF or the Oregon Board of Forestry (Board) because none of the laws identified in the claim and administered by the Board or ODF restrict the claimants' right to divide or develop the property for residential use. ORS 527.730 provides that "[n]othing in the Oregon Forest Practices Act shall prevent the conversion of forestland to any other use." The claim submitted by the claimants proposes subdividing the property into residential lots. To the extent that the claimants may propose a forest operation in conjunction with the conversion, claimants have not submitted a written notification as required by law. Without a notification ODF is unable to determine whether the laws listed in the claim apply to the claimants' use of the property or restrict their use of the property. As a result, ODF has not enforced any existing state land use regulation with respect to the claimants' use of the property. Finally, only Lazy H Ranch, LLC is a present owner of the subject property. Mr. Hemstreet is not a present owner of the subject real property. (See the complete recommendation in Section VI. of this report.)

III. COMMENTS ON THE CLAIM

Comments Received

See DLCD Final Staff Report.

IV. TIMELINESS OF CLAIM

See DLCD Final Staff Report for requirements.

Findings of Fact

The claim identifies certain specific laws as applying to the claimants' desired use of the land by subdividing it and developing a site on it for residential use. The regulations identified in the claim include portions of Oregon Revised Statute chapter 527, and Oregon Administrative Rules chapter 629. Only laws that were enacted prior to December 2, 2004, the effective date of ORS 197.352, are the basis for the claim. (See citations of statutory and administrative rule history of the Oregon Revised Statutes and Oregon Administrative Rules.)

Conclusions

The Claim has been submitted within two years of December 2, 2004, the effective date of ORS 197.352, based on land use regulations enacted prior to December 2, 2004, and is therefore timely filed.

V. ANALYSIS OF CLAIM

1. Ownership

ODF adopts the findings of fact and conclusions of law regarding ownership contained in the DLCDC Final Staff Report for this claim.

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 desired use of the property described in the claim is to divide it into up to 283 parcels of one to three acres each, and to develop a dwelling on each parcel. The claim refers to the following state statutes and administrative rules administered by ODF or the Board as laws that restrict the use of the property as the basis for the claim: ORS 527, and OAR chapter 629. There is no explanation of how or why these laws apply to or restrict the desired use of the property described in the claim. The state laws listed in the claim that are administered by the department only apply to forest operations (which is not the desired use the claimants have described in their claim).

One of the cited laws, ORS 527.730, Conversion of forestland to other uses, states, "Nothing in the Oregon Forest Practices Act shall prevent the conversion of forestland to any other use." No laws enforced by the Board or ODF restrict the division of the property or the establishment of dwellings.

The subject property includes trees. Certain uses of property are forest "operations" that are regulated under the Forest Practices Act. If trees are harvested for commercial use, some laws and rules listed in the claim will apply to the operation.

A notification of intent to conduct a forest operation is required in order for ODF to determine whether laws it or the Board may enforce apply to the claimants' intended use of the subject property. Only then can ODF determine whether there are restrictions that apply to the use of the subject property, and reduce its fair market value. No notification has been made.

The claim lists additional zoning ordinances that are administered by Yamhill County. These ordinances are not administered or enforced by the Board and ODF and are not addressed in this report.

Conclusions

Nothing in the laws that are listed in the claim and enforced or administered by ODF or the Board applies to or restricts the use of the property described in the claim. As a result, the department has no basis upon which it may determine that the claimants are entitled to relief under ORS 197.352.

Persons proposing to conduct a forest operation are required to submit a notification of the operation to ODF. Nothing in ORS 197.352 relieves an operator or landowner from this obligation, and until a notification is submitted, ODF is unable to determine whether laws it or the Board administers apply to the claimants' use of the property.

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 claimants have not demonstrated that any land use regulations administered by ODF or the Board restrict their use of the subject property or have the effect of reducing its fair market value. The information contained in the claim is based on the application of other laws, not administered by ODF or the Board. As a result, there is no relevant evidence in the record for this claim relating to the effect of laws administered by ODF or the Board on the fair market value of the subject property.

Conclusions

The claimants have not demonstrated that laws enforced or administered by ODF or the Board restrict their use of this property and thus have not demonstrated that those laws reduce the fair market value of the subject property.

4. Exemptions under ORS 197.352(3)

ORS 197.352 does not apply to certain land use regulations. These exemptions are set forth in ORS 197.352(3).

Findings of Fact

ORS 197.352(3) exempts laws that were enacted before a claimant acquired their interest in the property. Lazy H Ranch LLC acquired an interest in all the tax lots on December 23, 1997. Most forest practice laws were enacted initially in 1971 and 1972, although some date back to 1941. ODF is unable to determine whether 197.352(3)(E) or other exemptions in 197.352(3) may apply because the claimants have not proposed a use that is subject to these laws.

Some FPA regulations, now in OAR 629, divisions 625, 630, 635, and 640, were enacted to control water pollution resulting from forest operations. ORS 197.352(3)(B) specifically exempts regulations “restricting or prohibiting activities for the protection of public health and safety..., including pollution control.” Such regulations may apply to the property, depending upon the activities the claimants may wish to undertake.

Other FPA regulations cited by the claimants may be exempted under 197.352(3).

Conclusions

ODF concludes that many of the listed land use regulations are likely exempt under ORS 197.352(3). Until there is a notification of an operation, however, a final determination of the applicability of the listed laws to a particular forest operation on the property cannot be made.

VI. FORM OF RELIEF

Based on the current record, the claimant is not entitled to relief under ORS 197.352 from ODF or the Board. ODF denies any relief for this claim because neither the Board nor ODF has enforced laws that restrict the division of the subject property into parcels or lots, or the use of the property for residential purposes.

VII. COMMENTS ON THE DRAFT REPORT

ODF issued its draft staff report on this claim on August 18, 2006. OAR 125-145-0100(3), provides 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.

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

OREGON DEPARTMENT OF TRANSPORTATION

**Staff Report and Recommendation
September 5, 2006**

STATE CLAIM NUMBER: M 124347

NAME OF CLAIMANTS: Lazy H Ranch, LLC
Bob L. Hemstreet, Manager and Bob L.
Hemstreet, Co-Trustee of the Bob L. and
Mary J. Hemstreet Joint Revocable Trust

MAILING ADDRESS: 28880 Thomson Mill Rd
Sheridan, Oregon 97378

PROPERTY IDENTIFICATION: Township 4S, Range 6W, Section 22
Tax lots 600 and 601
Township 4S, Range 6W, Section 23
Tax lots 500, 700 and 1000
Township 4S, Range 6W, Section 26
Tax lots 200, 300, 400, 500, 600, 790 and 800
Township 4S, Range 6W, Section 27
Tax lots 100 and 1705
Yamhill County

OTHER CONTACT INFORMATION: Joseph T. Hagen
Hagen O'Connell, LLP
121 SW Morrison, Suite 1500
Portland, Oregon 97204

DATE RECEIVED BY DAS: March 14, 2006

180-DAY DEADLINE: September 10, 2006

I. SUMMARY OF THE CLAIM

See Department of Land Conservation and Development (DLCD) Staff Report.

II. SUMMARY OF STAFF RECOMMENDATION

Based on the preliminary findings and conclusions set forth below, the Department of Transportation (department) has determined that the claim is not valid as to either Lazy H Ranch, LLC Bob L. Hemstreet, Manager or Bob L. Hemstreet, Co-Trustee of the Bob L. and Mary J. Hemstreet Joint Revocable Trust. The department is unable to determine that any of the state laws listed by claimants that are administered by the department apply to claimants' desired use of the property. All of the listed laws administered by the department are exempt because the claimants acquired the property after the adoption of those state laws. In addition, only the Lazy H. Ranch LLC is a present owner of the subject real property. Based on the foregoing findings and conclusions, the claimants have not established entitlement to relief under ORS 197.352(1) as to laws administered by the department. As a result, the department recommends that the claim be denied as to those laws.

III. COMMENTS RECEIVED

See Land Conservation and Development (DLCD) Staff Report

IV. TIMELINESS OF CLAIM

Requirement

See Department of Land Conservation and Development (DLCD) Staff Report.

Findings of Fact

The claim was brought on March 14, 2006, which is within two years of the effective date of the measure (December 2, 2004).

Conclusions

The claim has been submitted within two years of the effective date of the measure and therefore is 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 findings of the Draft Staff Report of the Department of Land Conservation and Development on this claim regarding ownership are incorporated into this report by reference.

Conclusions

The conclusions of the Draft Staff Report of the Department of Land Conservation and Development on this claim regarding ownership are incorporated into this report by reference.

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 “state land use regulation” must restrict the LLC claimant’s desired 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 acquired the property.

Findings of Fact

The desired use of the property described in the claim is to divide it into up to 283 parcels of one to three acres each, and to develop a dwelling on each parcel. The claim does not describe any desired use of the property that is restricted by ORS 377.030 to 377.540. These statutes do not restrict land divisions or the construction of a home on a parcel.

Claimants included a chart listing numerous statutes and regulations, their “title” for those laws, a category they named “date of property impact,” and a category they named “effect.” They cited the following series of Oregon Revised Statutes: ORS 377.030 - 540. Their stated title for this series is “[t]rees; historic and scenic highways; scenic areas.” Their stated date of property impact is 1977. And their stated effect is “[r]ules governing highway beautification.”

The statutes cited in that series, with their actual titles, are as follows. Omitted ORS numbers are non-existent or have been repealed.

- ORS 377.030 Destruction or removal of trees on state highways without permission prohibited.
- ORS 377.040 Application to department to remove trees along state highways.
- ORS 377.050 Consent of Department for removal of trees along state highways.
- ORS 377.100 Study of highway system; designation of historic and scenic highways.
- ORS 377.105 Effect of designation as historic and scenic highway.
- ORS 377.505 Definitions for ORS 377.505 to 377.540.
- ORS 377.510 Signs visible from public highways regulated; junkyards prohibited; exceptions.
- ORS 377.515 Removal of nonconforming signs deferred.

ORS 377.521 Status of previously designated scenic areas.

In order for a claimant to establish an entitlement to relief under ORS 197.352, there must be a showing of at least the following:

- The use of the claimant's property is restricted by a state "land use regulation";
- The state agency has taken some action, after December 2, 2004, to enforce the land use regulation;
- The enforcement of the land use regulation also reduces the fair market value of the property in question; and
- The law is not one that was adopted to protect public health and safety, or that is otherwise exempt under ORS 197.352(3).

a) ORS 377.030 - .050

ORS 377.030 to 377.050 restrict the ability of private citizens to cut down trees and other vegetation on state highway right of way. These statutes do not control private parties' use of their own land, but rather control what private parties may do on state owned right of way. They are, therefore, not "land use regulations" at all. In addition, the state has taken no action to enforce ORS 377.030 - .050 since December 2, 2004, against the claimants' use of their property.

b) ORS 377.100 - .105

ORS 377.100 and 377.105 create a method for designating Historic & Scenic Highways, and describe what the Department is required or permitted to do to preserve the highway or highway related features so designated. These statutes do not control private parties' use of their own land, but rather control what the state may do on state owned right of way. They are, therefore, not "land use regulations" at all. Also, the parcel does not appear to be visible to any location designated a Historic and Scenic Highway. Claimants have not described any way in which the statute has impacted or would impact their desired use of the property, and the Department can discern none. In addition, the state has taken no action to enforce ORS 377.100 - .105 since December 2, 2004, against the claimants' use of their property.

c) ORS 377.505 - .521

ORS 377.505 to 377.521 is the remainder of the Designated Scenic Areas Act (the rest of which was repealed in 1977). This Act originally provided a method for the designation of highway stretches as Scenic based on their historic significance or scenic beauty. Off-premise signs that existed as of the designation date were required to be removed within seven years. That requirement remains (ORS 377.515), but no new designations have been made since 1971, and the method for adding designations has been repealed. Under current statutes no new off-premise signs are allowed, and most junkyards within such a stretch must be screened from view or removed. The parcel at issue does not appear to abut any state highway that has been designated a Scenic Area. Claimants have not described any way in which the statute has impacted or would impact their plan, and the Department can discern none. In addition, the state has taken no action to enforce ORS 377.505 - .521 since December 2, 2004, against the claimants' use of their property.

Conclusions

ORS 377.030 - .105 are not state "land use regulations." As for those laws that may be construed as "land use regulations" (ORS 377.505 - .521), they do not apply to or restrict the uses described in the claim because there are no Designated Scenic Areas within view of the property. The claimants have failed to identify a state land use regulation that has been enforced as to the claimants' use of the property in a manner that restricts its use. Since December 2, 2004, the department has not enforced a land use regulation under the cited statutes.

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

Claimants assert a claim for between \$10,779,644 and \$35,074,244. The claim describes the current value of the property and the projected value with the addition of a residential development. There is no proposal to cut trees on state property, no proposal to affect a designated Historic & Scenic Highway, no proposal to erect outdoor advertising signs, and no proposal to do anything that, by a reasonable reading of the claim, is affected by any of the statutes cited. Claimants have not provided any information on reduction in value based on the cited statutes, and the department is unable to determine that there has been any effect on the fair market value of the property as a result of the statutes listed in the claim.

Conclusions

To state a claim under ORS 197.352, claimants must allege some reduction in fair market value of their property caused by a land use regulation that restricts the use of the property. Based on the record currently before the department, the department concludes that there are no land use regulations identified in the claim and enforced by the department since December 2, 2004, that restrict the use of the subject property or that have the effect of reducing the fair market value.

4. Exemptions under ORS 197.352(3)

ORS 197.352 does not apply to certain land use regulations. The type of land use regulations not subject to a claim for compensation under ORS 197.352 are set forth in section 3 of the statute.¹

¹ In their list of statutes that is part of the claim packet, claimants include a footnote that states, "[t]he highway beautification provisions of ORS 377 are governed by the federal Highway Beautification Act of

Findings of Fact

ORS 197.352(3)(E) states that the act does not apply to land use regulations enacted prior to the date of acquisition of the property by the owner.

ORS 377.030 - .050 were passed in 1921 (General Laws of Oregon, 1921, Chapter 175).

ORS 377.100 - .105 were passed in 1983.

ORS 377.505 - .515 were passed in 1961. Amendments since then have not affected the substance of the regulations. ORS 377.521 was passed in 1977.

Conclusions

Based on the information in the record, the LLC claimant acquired the property on December 23, 1997. The LLC claimant acquired the property after the passage of the listed statutes. Therefore the LLC claimant is not entitled to compensation or waiver of regulation based on those statutes because they did not own the property before the enactment of these specific regulations.

VI. FORM OF RELIEF

ORS 197.352(1) provides for payment of compensation to an owner of private real property if the department has enacted or 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 to allow the present owner to carry out a use of the property permitted at the time the present owner acquired the property.

Findings of Fact

Based on the findings and conclusions set forth in this report, only the LLC claimant is an owner of the subject property, and the claim must be denied as to the other claimant (Mr. Hemstreet). As to the LLC claimant, the department has not enforced state land use regulations that apply to or restrict the claimant's desired use of the property. Nor have any of the listed statutes had the effect of reducing the fair market value of the property. Most of the statutes listed are not "land use regulations" at all. All of the cited statutes are exempt because the claimants acquired the property after the adoption of those state laws.

1965, 23 USC §§ 131, 136. This statute mandates the withholding of federal highway funds for non-compliance; it is not a mandate." Presumably claimants refer to the exemption for regulations passed to comply with federal law (ORS 197.352(3)(C)). None of the statutes cited are governed by the federal Highway Beautification Act (HBA). Therefore the department will not address whether the HBA is a federal requirement under the meaning of ORS 197.352.

Conclusion

Based on the foregoing findings and conclusions, the claimants have not established entitlement to relief under ORS 197.352 as to laws administered by the department. As a result, the department recommends that the claim be denied.

VII. NOTICE OF OPPORTUNITY TO COMMENT

The department issued its draft staff report on this claim on August 18, 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.