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. M124622
(BALLOT MEASURE 37) OF	)	
K & B Family Limited Partnership, CLAIMANT	)	

Claimant: K & B Family Limited Partnership (the Claimant)

Property: Township 2S, Range 45E (Section 32), Tax lot 9300
Township 3S, Range 45E, Section 5B, Tax lot 200
Wallowa 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 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 22nd day of September, 2006.

FOR THE DEPARTMENT OF ADMINISTRATIVE SERVICES:

David Hartwig, Administrator
DAS, State Services Division
Dated this 22nd 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)

ORS 197.352 (BALLOT MEASURE 37) CLAIM FOR COMPENSATION

OREGON DEPARTMENT OF LAND CONSERVATION AND DEVELOPMENT
Final Staff Report and Recommendation

September 22, 2006

STATE CLAIM NUMBER:	M124622
NAME OF CLAIMANT:	K & B Family Limited Partnership
MAILING ADDRESS:	PO Box 400 Enterprise, Oregon 97828
PROPERTY IDENTIFICATION:	Township 2S, Range 45E (Section 32) Tax lot 9300 Township 3S, Range 45E, Section 5B Tax lot 200 Wallowa County
OTHER CONTACT INFORMATION:	D. Rahn Hostetter PO Box 400 Enterprise, Oregon 97828
DATE RECEIVED BY DAS:	March 27, 2006
180-DAY DEADLINE:	September 23, 2006

I. SUMMARY OF CLAIM

The claimant, K & B Family Limited Partnership, seeks compensation in the amount of $1 million for the reduction in fair market value as a result of land use regulations that are alleged to restrict the use of certain private real property. The claimant desires compensation or the right to divide the 61.93-acre subject property into 11 five-acre parcels and to develop a dwelling on each parcel. The subject property is located on the west side of the Joseph–Wallowa Lake Highway, south of the City of Joseph, in Wallowa 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. Department staff recommends that the claim be denied because the state land use regulations identified in the claim are exempt under ORS 197.352(3)(E). (See the complete recommendation in Section VI. of this report.)

III. COMMENTS ON THE CLAIM

Comments Received

On August 11, 2006, pursuant to Oregon Administrative Rule (OAR) 125-145-0080, the Oregon Department of Administrative Services (DAS) provided written notice to the owners of surrounding properties. DAS has forwarded the written comments received in response to the 10-day notice to the department.

Many of the comments address whether the claim meets the criteria for relief under ORS 197.352, and have been considered in the preparation of this report.

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 comments 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 27, 2006, for processing under OAR 125, division 145. The claim identifies Statewide Planning Goal 5 (Natural Resources) and OAR 660-0023, both as implemented by Wallowa County Zoning Article 44.035A and 44.035F, as the basis for the claim.[1] Only laws that were enacted or adopted prior to December 2, 2004, are the basis for this claim.

[1] The initial claim form identified only Goal 5. By letter dated August 7, 2006, the claimant's attorney stated that he was confirming that the state claim "is limited to Goal 5 and OAR 660, Division 23 as implemented by Sections 43.035A and 43.035F of the Wallowa County Land Development Ordinance."

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, K & B Family Limited Partnership, acquired the subject property on February 1, 2002, as reflected by a deed included with the claim.[2] The Wallowa County Assessor's Office confirms the claimant's current ownership of the subject property.

Conclusions

The claimant, K & B Family Limited Partnership, is an "owner" of the subject property as that term is defined by ORS 197.352(11)(C), as of February 1, 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 use the subject property for residential purposes. The claimant's attorney clarified, by letter dated June 16, 2006, that the desired use of the property is "to use the property for residential purposes, with the option to do so on city-sized residential lots as permitted by the UGA Zone currently applicable to the property." The UGA zone permits single-family dwellings on lots with a minimum size of five acres. WCLDO 26.025.01. As a result, the department has evaluated this claim based on the claimant's desired use to divide the 61.93-acre subject property into 11 five-acre residential lots and to establish a single-family dwelling on each lot.

The state land use regulations that are the subject of this claim are Goal 5 and OAR 660, division 23, both as implemented by Article 44 of the Wallowa County Development Ordinance. Goal 5 and OAR 660, division 23, normally do not apply directly to a person's use of particular

[2] K & B Family Limited Partnership is a foreign limited partnership registered with the Oregon Secretary of State.

property until and unless a local government has inventoried Goal 5 resources on the property and adopted a program to protect those resources by limiting or prohibiting conflicting uses. In this case, Wallowa County has taken a variety of actions to implement Goal 5 and OAR 660, division 23, the most recent being the adoption of Article 44, including 44.035A and 44.035F, which were adopted on May 6, 2002. The county also implemented Goal 5 in its earlier action adopting parts 01 to 08 of Article 28.

Article 44.035A and 44.035F contain land use regulations protecting certain cultural areas, wildlife habitat, scenic views and sites and natural areas that include the subject property.[3] Article 44 was adopted by Wallowa County, as required by Goal 5 and OAR 660, divisions 16 and 23.[4]

The claimant acquired the subject property on February 1, 2002, prior to the adoption of Article 44. While Wallowa County has acted to "not apply" 44.035A and 44.035F to the claimant's use of the property in response to a claim to the county under ORS 197.352, the property is still subject to Goal 5 and OAR 660, division 23, to the extent that it was inventoried as containing one or more Goal 5 resources. OAR 660, division 23, applies only to the extent that the inventoried resource(s) are other than cultural resources (which are subject to OAR 660, division 16, rather than 660, division 23).[5] Goal 5 and OAR 660, division 23, apply by requiring the protection of Goal 5 resources that are inventoried as significant.

Under the record for this claim, it is not clear to what extent Goal 5 and OAR 660, division 23, restrict the claimant's desired use of the subject property, but the department finds that these laws do apply to the claimant's desired use and that they restrict it to some extent.

The claimant's desired use of the subject property is also subject to Goal 5 and OAR 660, division 23, as implemented by the county's Article 28, Goal 5 Resource Overlay.[6] Article 28 includes protection standards applicable to wildlife habitat, cultural areas and natural areas, including the Wallowa Lake moraines.[7] However, to the extent Goal 5 and OAR 660, division 23, apply to the claimant's desired use of the subject property as a result of Article 28, they do not restrict that use because these laws were in effect when the claimant acquired the property on February 1, 2002.

Conclusions

To the extent that Goal 5 and OAR 660, division 23, apply to the claimant's desired use of the subject property as a result of Wallowa County's adoption of Article 44.035A and 44.035F, these state laws restrict the claimant's desired use of the property relative to the uses allowed when the claimant acquired the property.

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[3] The ORS 197.352 claim for compensation filed with Wallowa County was only for Article 44.035A and 44.035F. The claim filed with the state also encompasses Goal 5 and OAR 660, division 23, only as they have become applicable to the subject property through the county's adoption of Article 44.035A and 44.035F.
[4] OAR 660, division 16, applies to cultural areas (OAR 660-023-0250(1)).
[5] No claim was made concerning the application of OAR 660, division 16, to the claimant's use of the property.
[6] OAR 660, division 16, became effective on June 29, 1981.
[7] Section 28.020(6) of Article 28, provides that development permits for known archeological sites will not be approved without proof of an applicant's compliance with applicable state and federal requirements protecting known or suspected sites.

This report addresses only those state laws that are identified in the claim, or that the department is certain apply to the subject property based on the uses that the claimant has identified. There may be other laws that apply to the claimant's desired use of the subject property that have not been identified in the claim.

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 million as the reduction in the subject property's fair market value due to the regulation(s) that restrict the claimant's desired use of the property. This amount is based on appraisals of the subject property. Comments submitted have noted that one of the two appraisals that are used as evidence of fair market value contains express terms providing that it is not to be relied upon except for particular purposes, not including a claim under ORS 197.352. The department has not relied on this appraisal in its evaluation of this claim.

Conclusions

As explained in Section V.(1) of this report, the claimant is K & B Family Limited Partnership, which acquired the subject property on February 1, 2002. Under ORS 197.352, the claimant is due compensation for land use regulations that restrict the use of the subject property and have the effect of reducing its fair market value. Based on the findings and conclusions in Section V.(2) of this report, certain state land use regulations restrict the claimant's desired use of the property. The claimant estimates that the effect of the regulation(s) on the fair market value of the subject property is a reduction of $1 million. Although much argument has been submitted concerning the claimant's estimate, no evidence to the contrary has been provided.

Based on the evidence in the record for this claim, the department determines that the fair market value of the subject property has been reduced to some extent as a result of state land use regulations.

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, specifically Goal 5 and OAR 660, division 23, to the extent they apply to the claimant's use of the property as a result of Wallowa County's adoption of Article 44.035A and 44.035F of the Land Development Ordinance. Goal 5 and OAR 660, division 23, were adopted before the

claimant acquired the subject property.[8] Under ORS 197.352(3)(E), ORS 197.352(1) does not apply to land use regulations that were enacted or adopted before the claimant acquired the property. As a result, this claimant has no right to compensation for Goal 5 or OAR 660, division 23.

Conclusions

The two sets of state land use regulations that are the basis for this claim, Goal 5 and OAR 660, division 23, were both adopted before February 1, 2002, the date on which the claimant acquired the subject property. As a result, the requirement to pay just compensation under ORS 197.352(1) does not apply, and the department has no authority to provide relief to this claimant with regard to its desired use of the subject property.[9]

This report addresses only those state laws that are identified in the claim. Similarly, this report only addresses the exemptions provided for under ORS 197.352(3) that are clearly applicable, given the information provided to the department in the claim. The claimant should be aware that the less information it has provided to the department in the claim, the greater the possibility that there may be additional laws that will later be determined to continue to apply to its use of the subject property.

VI. FORM OF RELIEF

Based on the foregoing findings of fact and conclusions of law, the department is not authorized to provide relief to this claimant for this claim. As a result, the department recommends that the claim be denied.

VII. COMMENTS ON THE DRAFT STAFF REPORT

The department issued its draft staff report on this claim on August 31, 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.

[8] There were some limited amendments to OAR 660, division 23, adopted after February 1, 2002. However, none of the new provisions apply to the claimant's desired use (for the most part they address aggregate uses).

[9] As there is no requirement to pay just compensation under ORS 197.352(1), there is also no authority to "modify, remove, or not apply" the identified state land use regulations in lieu of paying just compensation (under ORS 197.352(8)).