

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

September 1, 2006

STATE CLAIM NUMBER: M124653

NAME OF CLAIMANT: Caroline Stevens

MAILING ADDRESS: 5626 Stevens Road
Otis, Oregon 97368

PROPERTY IDENTIFICATION: Township 7, Range 11, Section 12B
Tax lot 201
Lincoln County

DATE RECEIVED BY DAS: March 28, 2006

180-DAY DEADLINE: September 24, 2006

I. SUMMARY OF CLAIM

The claimant, Caroline Stevens, seeks compensation in the amount of \$256,000 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 claimant desires compensation or the right to divide the approximately 5.5-acre subject property into one approximately 2.5-acre parcel on which an existing dwelling is located, one 1.2-acre parcel and one 1.8-acre parcel, and to develop a dwelling on each of the 1.2- and 1.8-acre parcels.. The subject property is located at 5626 Stevens Road, near Lincoln City, in Lincoln 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 claim is valid in part. Department staff recommends that, in lieu of compensation, the requirements of the following state laws enforced by the Land Conservation and Development Commission (the Commission) or the department not apply to Caroline Stevens' division of the approximately 2.5-acre portion of the subject property zoned Timber Conservation (TC) from the remaining approximately 3-acre portion of the property zoned R-1: applicable provisions of Statewide Planning Goal 4 (Forest Lands), ORS 215 and Oregon Administrative Rules (OAR) 660, division 6. These laws will not apply to the claimant only to the extent necessary to allow her to use TC-zoned portion of the property for the use described in this report, and only to the extent that use was permitted when she acquired the property in 1972.

Based on the preliminary findings and conclusions set forth below, the department has determined that the claim is not valid as it relates to the R-1-zoned portion of the property, located within Lincoln City's urban growth boundary (UGB), because neither the Commission nor the department has enforced laws that restrict the claimant's use of that portion of the property. (See the complete recommendation in Section VI of this report.)

III. COMMENTS ON THE CLAIM

Comments Received

On July 11, 2005, pursuant to OAR 125-145-0080, the Oregon Department of Administrative Services (DAS) provided written notice to the owners of surrounding properties. According to DAS, 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 March 28, 2006, for processing under OAR 125, division 145. The claim identifies OAR 660, divisions 4, and 6, 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, Caroline Stevens, acquired the subject property on February 28, 1972, as reflected by a bargain and sale deed included with the claim. A 2005–06 tax statement submitted with the claim establishes the claimant’s current ownership of the subject property.

Conclusions

The claimant, Caroline Stevens, is an “owner” of the subject property as that term is defined by ORS 197.352(11)(C), as of February 28, 1972.

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 approximately 5.5-acre subject property into one 2.5-acre parcel located in the TC-zoned portion of the property and on which an existing dwelling is located, and one 1.2-acre parcel and one 1.8-acre parcel located in the R-1-zoned portion of the property, and to develop a dwelling on each of the 1.2- and 1.8-acre parcels. The claim indicates that state and county land use laws prevent the desired use.

The claim is based in part on the applicable provisions of state law that require forest zoning and rural residential zoning. The eastern approximately 2.5-acre portion of the subject property is zoned TC by Lincoln County, as required by Goal 4, in accordance with ORS 215 and OAR 660, division 6, because the claimant’s property is “forest land” under Goal 4. Goal 4 became effective on January 25, 1975, and requires that forest land be zoned for forest use (see statutory and rule history under OAR 660-015-0000(4)). The forest land administrative rules (OAR 660, division 6) became effective on September 1, 1982, and ORS 215.705 to 215.755 and 215.780 became effective on November 4, 1993 (Chapter 792, Oregon Laws 1993). OAR 660-006-0026 and 660-006-0027 were amended on March 1, 1994, to implement those statutes.

Together, ORS 215.705 to 215.755 and 215.780 and OAR 660, division 6, enacted or adopted pursuant to Goal 4, prohibit the division of forest land into parcels less than 80 acres.

The western portion of the subject property is currently zoned R-1 by Lincoln County. That portion of the subject property is located within Lincoln City's UGB.

In general, the zoning of a particular property within a UGB is determined by the city or county with land use jurisdiction over the property. In some circumstances, the Commission's rules or state statutes may apply to a local government decision regarding zoning, but usually, within a UGB, state laws require or encourage a higher intensity of development rather than restrict the use of real property. In this case, the claimant has not alleged how a specific state land use regulation restricts the use of the R-1-zoned portion of the property with the effect of reducing the fair market value of that portion of the property.¹

The claimant acquired the subject property on February 28, 1972, prior to the adoption of the statewide planning goals and their implementing statutes and regulations.

Conclusions

The current zoning requirements and minimum lot size standards established by Goal 4 and provisions applicable to land zoned for forest use in ORS 215 and OAR 660, division 6, were all enacted or adopted after the claimant acquired the subject property in 1972 and do not allow the desired division of the TC-zoned portion of the property from the remaining R-1-zoned portion of the property. These laws restrict the division of TC-zoned portion of the property from the remainder of the property, relative to the uses allowed when the claimant acquired the property.²

With regard to the portion of the property zoned R-1, which is located within Lincoln City's UGB, the department has not identified any state laws that restrict the claimant's desired use of that portion of the property.

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 use that the claimant has identified. There may be other laws that currently apply to the claimant's use of the subject property, and that may continue to apply to the claimant's use of the property, that have not been identified in the claim. In some cases, it will not be possible to know which laws apply to a use of the subject property until there is a specific proposal for that use. When the claimant seeks a building or development permit to carry out a specific use, it may become evident that other state laws apply to that use.

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."

¹ The claimant cites OAR 660-004-0040 as a law that restricts the R-1-zoned portion of the subject property. However, OAR 660-004-0400 only regulates divisions of property designated for rural residential development. It does not apply within UGBs.

² The claimant has asserted that her desired use of the TC-zoned portion of the subject property is to maintain a dwelling on that approximately 2.5-acre portion of the property. The claimant does not seek additional development of that portion of the property.

Findings of Fact

The claim includes an estimate of \$256,000 as the reduction in the subject property's fair market value due to the regulations that restrict claimant's desired use of the subject property. This amount is based on a limited appraisal letter submitted with the claim. That appraisal letter evaluates only the vacant, approximately 3-acre portion of the property zoned R-1 and estimates that, as one 3-acre homesite, this portion of the property would be valued at \$160,000, and that, as two 1.5-acre homesites, this portion of the property would be valued at \$126,000 for each homesite. The appraisal does not evaluate the value of the TC-zoned portion of the property on which the existing dwelling is located.

Conclusions

As explained in Section V.(1) of this report, the claimant is Caroline Stevens who acquired the subject property on February 28, 1972. 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, laws enacted or adopted since the claimant acquired the subject property restrict the claimant's desired division of the TC-zoned portion of the property from the remainder of the property. The claimant estimates that the effect of the regulations on the fair market value of the R-1-zoned portion of the property is a reduction of \$256,000. However, as described in Section V.(2) of this report, the claimant has not established that any state land use regulations restrict her use of that portion of the subject property, which is located inside the Lincoln City UGB. With regard to the claimant's desired division of the TC-zoned portion of the property from the remainder of the property, the claimant has not provided sufficient information to substantiate a specific dollar amount by which the land use regulations have reduced the fair market value of that portion of the property. Nevertheless, based on the evidence in the record for this claim, the department determines that the fair market value of the TC-zoned portion of the property has been reduced to some extent as a result of land use regulations enforced by the Commission or the department.

4. Exemptions Under ORS 197.352(3)

ORS 197.352 does not apply to certain land use regulations. In addition, under ORS 197.352(3), certain types of laws are exempt from ORS 197.352.

Findings of Fact

The claim is based in part on state land use regulations that restrict the use of the TC-zoned portion of the property, including applicable provisions of Goal 4, ORS 215 and OAR 660, division 6, which Lincoln County has implemented through its current TC zone. All of these land use regulations were enacted or adopted after the claimant acquired the subject property.

Conclusions

Without a specific development proposal for the subject property, it is not possible for the department to determine all the laws that may apply to a particular use of the property, or whether those laws may fall under one or more of the exemptions under ORS 197.352. It

appears that none of the general statutory, goal and rule restrictions on residential division and development of the subject property were in effect when the claimant acquired the property in 1972. As a result, these laws are not exempt under ORS 197.352(3)(E).

Laws in effect when the claimant acquired the subject property are exempt under ORS 197.352(3)(E) and will also continue to apply to the claimant's use of the TC-zoned portion of the property. In addition, the department notes that ORS 215.730 and OAR 660, division 6, include standards for siting dwellings in forest zones. Those provisions include fire protection standards for dwellings. ORS 197.352(3)(B) specifically exempts regulations "restricting or prohibiting activities for the protection of public health and safety, such as fire and building codes...." Accordingly, siting standards for dwellings in forest zones in ORS 215.730 and OAR 660, division 6, are exempt under ORS 197.352(3)(B).

There may be other laws that continue to apply to the claimant's use of the subject property that have not been identified in the claim. In some cases, it will not be possible to know which laws apply to a use of the subject property until there is a specific proposal for that use. When the claimant seeks a building or development permit to carry out a specific use, it may become evident that other state laws apply to that use. In some cases, some of these laws may be exempt under ORS 197.352(3)(A) to (D).

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 use that the claimant has identified. 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 she 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 her use of 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 record for this claim, the claimant has not established that any state laws enforced by the Commission or the department restrict use of the R-1-zoned portion of the subject property, and have the effect of reducing the fair market value of the property. Because that portion of the subject property is located within Lincoln City's UGB, neither the Commission nor the department enforces laws that require specific zoning of the property.

Based on the findings and conclusions set forth in this report, laws enforced by the Commission or the department restricts the claimant's desired use of the portion of the subject property zoned for forest use. The claim asserts that existing state land use regulations enforced by the Commission or the department have the effect of reducing the fair market value of the R-1-zoned portion of the property by \$256,000. However, without an appraisal or other relevant evidence demonstrating that the land use regulations described in Section V.(2) reduce the fair market value of the TC-zoned portion of the property, a specific amount of compensation cannot be determined. In order to determine a specific amount of compensation due for this claim, it would also be necessary to verify whether or the extent to which the claimant's desired division of the TC-zoned portion of the property from the R-1 zoned portion of the property was allowed under the standards in effect when she acquired the property. Nevertheless, based on the record for this claim, the department has determined that the laws on which the claim is based have reduced the fair market value of the TC-zoned portion of the property to some extent.

No funds have been appropriated at this time for the payment of claims. In lieu of payment of compensation, ORS 197.352 authorizes the department to modify, remove or not apply all or parts of certain land use regulations to allow Caroline Stevens to use the TC-zoned portion of the property for a use permitted at the time she acquired the property on February 28, 1972.

Conclusions

Based on the record before the department, the claimant, Caroline Stevens, 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 as to the R-1-zoned portion of the property located inside the Lincoln City UGB. Therefore, the department recommends that this claim be denied as to the R-1-zoned portion of the subject property.

Based on the record, the department recommends that the claim be approved as to the TC-zoned portion of the property, subject to the following terms:

1. In lieu of compensation under ORS 197.352, the State of Oregon will not apply the following laws to Caroline Stevens' division of the approximately 2.5-acre portion of the subject property zoned TC from the remaining approximately 3-acre portion of the property zoned R-1: applicable provisions of Goal 4, ORS 215 and OAR 660, division 6. These land use regulations will not apply to the claimant only to the extent necessary to allow her to use the TC-zoned portion of the property for the use described in this report, and only to the extent that use was permitted when she acquired the property on February 28, 1972.
2. The action by the State of Oregon provides the state's authorization to the claimant to use the TC-zoned portion of the property for the use described in this report, subject to the standards in effect on February 28, 1972.
3. To the extent that any law, order, deed, agreement or other legally enforceable public or private requirement provides that the subject property may not be used without a permit, license or other form of authorization or consent, the order will not authorize the use of the property unless the claimant obtains that permit, license or other form of authorization or consent. Such requirements may include, but are not limited to: a building permit, a land use decision, a

“permit” as defined in ORS 215.402 or 227.160, other permits or authorizations from local, state or federal agencies and restrictions on the use of the subject property imposed by private parties.

4. Any use of the subject property by the claimant under the terms of the order will remain subject to the following laws: (a) those laws not specified in (1) above; (b) any laws enacted or enforced by a public entity other than the Commission or the department; and (c) those laws not subject to ORS 197.352 including, without limitation, those laws exempted under ORS 197.352(3).

5. Without limiting the generality of the foregoing terms and conditions, in order for the claimant to use the subject property, it may be necessary for her to obtain a decision under ORS 197.352 from a city and/or county and/or metropolitan service district that enforces land use regulations applicable to the property. Nothing in this order relieves the claimant from the necessity of obtaining a decision under ORS 197.352 from a local public entity that has jurisdiction to enforce a land use regulation applicable to a use of the subject property by the claimant.

VII. NOTICE OF OPPORTUNITY TO COMMENT

This staff report is not a final decision by the department and does not authorize any use of the property that is the subject of this report. OAR 125-145-0100 provides an opportunity for the claimant 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. Such response must be filed no more than 10 calendar days after the date this report is mailed to the claimant and any third parties. Responses to this draft staff report and recommendation will be considered only as comments related to the claim described in this report. 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 and will be deemed timely filed if either postmarked on the tenth day, or actually delivered to DAS by the close of business on the tenth day. Note: Please reference the claim number, claimant name and clearly mark your comments as “Draft Staff Report comments.” Comments must be submitted in writing only. Those comments submitted electronically or by facsimile will not be accepted.