

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. M124699
(BALLOT MEASURE 37) OF)	
Barbara R. Morgan, CLAIMANT)	

Claimant: Barbara R. Morgan (the Claimant)

Property: Township 13S, Range 34E, Sections 24 and 25, Tax lot 4102
Township 13S, Range 35E, Sections 19 and 30, Tax lot 400
Grant 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 approved as to laws administered by DLCD and the Land Conservation and Development Commission (LCDC) for the reasons set forth in the DLCD Report, and 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 Barbara Morgan's division of 45 five-acre parcels from the 718.21-acre subject property and development of a dwelling on each five-acre parcel, and to her development of a destination resort on the remaining 493-acre parcel: applicable provisions of Goals 3 and 4, ORS 197 and 215, and OAR 660, divisions 6 and 33, enacted or adopted after January 17, 2005. The department acknowledges that the relief to which the claimant is entitled under ORS 197.352 will not allow the claimant to use the subject property in the manner set forth in the claim.
2. The action by the State of Oregon provides the state's authorization to the claimant to use the subject property for the use described in this report, subject to the standards in effect on month January 17, 2005. At that time, the property was subject to applicable provisions of Goals 3 and 4 and the applicable provisions of ORS 197 and 215, and OAR 660, divisions 6 and 33, currently in effect.

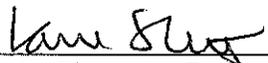
3. To the extent that any law, order, deed, agreement or other legally enforceable public or private requirement provides that the subject property may not be used without a permit, license or other form of authorization or consent, the order will not authorize the use of the property unless the claimant first 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.

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.

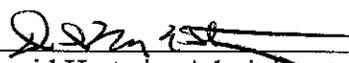
FOR DLCD AND THE LAND
CONSERVATION AND
DEVELOPMENT COMMISSION:



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 judicial remedies including the following:

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 22, 2006

STATE CLAIM NUMBER: M124699

NAME OF CLAIMANT: Barbara R. Morgan

MAILING ADDRESS: 25449 Summit Prairie Road
Prairie City, Oregon 97869

PROPERTY IDENTIFICATION: Township 13S, Range 34E, Sections 24 and 25
Tax lot 4102
Township 13S, Range 35E, Sections 19 and 30
Tax lot 400
Grant County

DATE RECEIVED BY DAS: March 30, 2006

180-DAY DEADLINE: September 26, 2006

I. SUMMARY OF CLAIM

The claimant, Barbara Morgan, seeks compensation in the amount of \$3,308,074 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 45 five-acre parcels from the 718.21-acre subject property and develop a dwelling on each five-acre parcel, and to develop a destination resort on the remaining approximately 493 acres. The subject property is located adjacent to the Malheur National Forest on Reynolds Creek Road, near Prairie City, in Grant 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 valid. 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 Barbara Morgan's division of 45 five-acre parcels from the 718.21-acre subject property and development of a dwelling on each five-acre parcel, and to her development of a destination resort on the remaining 493-acre parcel: applicable provisions of Statewide Planning Goals 3 (Agricultural Lands) and 4 (Forest Lands), ORS 197 and 215, and Oregon Administrative Rules (OAR) 660, divisions 6 and 33, enacted or adopted after January 17, 2005. These laws will not apply to the claimant only to the extent necessary to allow her to use the subject property for the use described in this report, and only to the extent that use was permitted

when she acquired the property on January 17, 2005. The department acknowledges that the relief to which the claimant is entitled under ORS 197.352 will not allow the claimant to use the subject property in the manner set forth in the claim. (See the complete recommendation in Section VI of this report.)

III. COMMENTS ON THE CLAIM

OAR 125-145-0100 provides an opportunity for the claimant or the claimant's authorized agent and any third parties 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.

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 criterion 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 criterion, whichever is later.

Findings of Fact

This claim was submitted to DAS on March 30, 2006, for processing under OAR 125, division 145. The claim identifies ORS 215 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’s parents, W. Ray Morgan and Genevieve D. Morgan, acquired the subject property on April 19, 1960, and May 31, 1963, as evidenced by deeds included with the claim. The subject property was transferred to the claimant from her father’s estate, pursuant to the terms of his will, which was included in the claim.¹ On June 3, 2003, the claimant conveyed the subject property to the Barbara R. Morgan Charitable Remainder Unitrust, an irrevocable trust, as reflected by a trust agreement included with the claim. Transfer of property to an irrevocable trust results in a change in ownership for the purposes of ORS 197.352. The trust conveyed the subject property to the claimant as successor trustee on January 17, 2005, as reflected by a deed included with the claim. The Grant County Assessor’s Office confirms the claimant’s current ownership of the subject property.

Conclusions

The claimant, Barbara Morgan, is an “owner” of the subject property as that term is defined by ORS 197.352(11)(C), as of January 17, 2005. The claimant’s parents, W. Ray and Genevieve D. Morgan, are “family members” as defined by ORS 197.352(11)(A) and acquired the subject property on April 19, 1960, and May 31, 1963.

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 45 five-acre parcels from the 718.21-acre subject property and develop a dwelling on each such parcel, and to develop a destination resort on the remaining approximately 493 acres. It indicates that ORS 215 prohibits the desired use.

The 718.21-acre subject property is located in three zones. The claim for a portion of the subject property is based generally on the applicable provisions of state law that require Exclusive Farm Use (EFU) zoning and restrict uses on EFU-zoned land. A portion of the claimant’s property is zoned EFU and Multiple Use Range by Grant County, as required by Goal 3, in accordance with

¹ The claim does not establish when the claimant’s parents died and, therefore, does not establish when she originally acquired the subject property through her father’s estate.

ORS 215 and OAR 660, division 33, because this portion of the claimant's property is "agricultural land" as defined by Goal 3.² Goal 3 became effective on January 25, 1975, and required that agricultural lands as defined by Goal 3 be zoned EFU pursuant to ORS 215.

Current land use regulations, particularly ORS 215.263, 215.283, 215.284 and 215.780 and OAR 660, division 33, enacted or adopted pursuant to Goal 3, prohibit the division of EFU-zoned land into parcels smaller than 80 acres, and establish standards for the development of dwellings on existing or proposed parcels on that land.³

ORS 215.780 establishes an 80-acre minimum size for the creation of new lots or parcels in EFU zones and became effective on November 4, 1993 (Chapter 792, Oregon Laws 1993).

ORS 215.263 (2003 edition) establishes standards for the creation of new parcels for non-farm uses and dwellings allowed in an EFU zone.

OAR 660-033-0135 (applicable to farm dwellings) became effective on March 1, 1994, and interprets the statutory standard for a primary dwelling in an EFU zone under ORS 215.283(1)(f). OAR 660-033-0130(4) (applicable to non-farm dwellings) became effective on August 7, 1993, and was amended to comply with ORS 215.284(4) on March 1, 1994. The Commission subsequently adopted amendments to comply with House Bill 3326 (Chapter 704, Oregon Laws 2001, effective on January 1, 2002), which were effective on May 22, 2002. (See administrative rule history for OAR 660-033-0100, -0130 and -0135.)

The claim for the remaining portion of the subject property is based generally on the applicable provisions of state law that require forest zoning and restrict uses on forest land. A portion of the claimant's property is zoned Primary Forest by Grant County, as required by Goal 4, in accordance with ORS 215 and OAR 660, division 6. Goal 4 and the required provisions applicable to land zoned for forest use in ORS 215 and OAR 660, division 6, restrict the zoning, use and division of the relevant portion of the subject property. Goal 4 became effective on January 25, 1975, and required that forest lands as defined by Goal 4 be zoned pursuant to the relevant provisions of ORS 215, most of which became effective in 1963, and ORS 527 (Forest Practices). OAR 660, division 6, which implemented Goal 4 requirements for forest land, became effective on February 5, 1990. ORS 215.780, which established an 80-acre minimum size for the creation of new lots or parcels in farm and forest zones, became effective on November 4, 1993 (Chapter 792, Oregon Laws 1993).⁴

The claimant's family first acquired the subject property in 1960 and 1963, prior to the adoption of the statewide planning goals and their implementing statutes and rules. No county zoning applied to the subject property in 1960 and 1963.

² A portion of the claimant's property is "agricultural land" because it contains National Resources Conservation Service Class I-VI soils.

³ ORS 215.283(2)(t) and OAR 660-033-0120 (Table 1) establish that destination resorts are permitted in EFU zones, subject to the requirements of Goal 8 (Recreational Needs) and ORS 197.435 to 197.467. However, because Grant County has not adopted a destination resort program, Goal 8 and ORS 197.435 *et seq.* do not apply to lands in Grant County.

⁴ OAR 660-006-0025(2)(n) establishes that destination resorts are permitted in forest zones, subject to the requirements of Goal 8 and ORS 197.435 to 197.467. However, because Grant County has not adopted a destination resort program, Goal 8 and ORS 197.435 *et seq.* do not apply to lands in Grant County.

Conclusions

The current zoning requirements, minimum lot size and dwelling standards established by applicable provisions of Goals 3 and 4, ORS 197 and 215, and OAR 660, divisions 6 and 33, were all enacted or adopted after the claimant's family acquired the subject property. These laws restrict the use of the subject property relative to the uses allowed when the claimant's family acquired the property.

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 \$3,308,074 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 a February 1, 2005, appraisal submitted with the claim.

Conclusions

As explained in Section V.(1) of this report, the claimant is Barbara Morgan whose family members acquired the subject property in 1960 and 1963. Under ORS 197.352, the claimant is due compensation for land use regulations that restrict the use of the 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's family acquired the subject property restrict the claimant's desired use of the property. The claimant estimates that the effect of the regulations on the fair market value of the subject property is a reduction of \$3,308,074.

Without additional documentation establishing whether or the extent to which the regulations identified in Section V.(2) have the effect of reducing the property's fair market value, it is not possible to substantiate the specific dollar amount by which the land use regulations have reduced the fair market value of the subject property. Nevertheless, 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 land use regulations enforced by the Commission or the department since the claimant's family acquired the property.

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 relative to the uses permitted when the claimant's family acquired the property in 1960 and 1963, including applicable provisions of Goals 3 and 4, ORS 197 and 215, and OAR 660, divisions 6

and 33, which Grant County has implemented through its current EFU, Multiple Use Range and Primary Forest zones. All of these land use regulations were enacted or adopted after the claimant's family acquired the subject property.

Conclusions

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's family acquired the property on April 19, 1960, and May 31, 1963. As a result, these laws are not exempt under ORS 197.352(3)(E). Laws in effect when the claimant's family acquired the subject property are exempt under ORS 197.352(3)(E) and do not provide a basis for compensation. In addition, other land use laws enacted or adopted for a purpose set forth in ORS 197.352(3)(A) to (D) are also exempt and would not provide a basis for compensation.

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 restrict the claimant's desired use of the subject property. 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 subject property by \$3,308,074. However, without additional relevant evidence demonstrating that the land use regulations described in Section V.(2) reduce the fair market value of the subject property, a specific amount of compensation cannot be determined. In order to determine a specific amount of compensation due for this claim, it would be necessary to verify whether or the extent to which the claimant's desired use of the subject 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 subject 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 Barbara Morgan to use the subject property for a use permitted at the time she acquired the property on January 17, 2005.

At the time the claimant acquired an interest in the subject property, it was zoned EFU, Multiple Use Range and Primary Forest by Grant County and subject to the current lot size and standards

for divisions and development under Goals 3 and 4, ORS 197 and 215, and OAR 660, divisions 6 and 33, and as described in Section V.(2) of this report.

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.

Conclusions

Based on the record, the department recommends that the claim be approved, 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 Barbara Morgan's division of 45 five-acre parcels from the 718.21-acre subject property and development of a dwelling on each five-acre parcel, and to her development of a destination resort on the remaining 493-acre parcel: applicable provisions of Goals 3 and 4, ORS 197 and 215, and OAR 660, divisions 6 and 33, enacted or adopted after January 17, 2005. The department acknowledges that the relief to which the claimant is entitled under ORS 197.352 will not allow the claimant to use the subject property in the manner set forth in the claim.
2. The action by the State of Oregon provides the state's authorization to the claimant to use the subject property for the use described in this report, subject to the standards in effect on month January 17, 2005. At that time, the property was subject to applicable provisions of Goals 3 and 4 and the applicable provisions of ORS 197 and 215, and OAR 660, divisions 6 and 33, currently in effect.
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 first 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. COMMENTS ON THE DRAFT STAFF REPORT

The department issued its draft staff report on this claim on September 5, 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.