

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 A
COMPENSATION UNDER ORS 197.352) CLAIM NO. M129376
(BALLOT MEASURE 37) OF)
Mary Hayes, CLAIMANT)

Claimant: Mary Hayes (the Claimant)

Property: Township 2S, Range 45E, Section 31, Tax lot 1500

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 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 state laws to Mary Hayes's division of tax lot 1500 into 5-acre parcels and to her development of a dwelling on each parcel: applicable provisions of Goal 3, ORS 215 and OAR 660, division 33. These laws will not apply to the claimant's use of tax lot 1500 only to the extent necessary to allow her to use this tax lot for the use described in this report, and only to the extent that use was permitted when she acquired it on October 1, 1964.
2. The action by the State of Oregon provides the state's authorization to the claimant to use tax lot 1500 for the use described in this report without application of the otherwise applicable provisions of Goal 3, ORS 215 and OAR 660, division 33. The claimant's use of tax lot 1500 is still subject to any other state land use regulations that may apply to her use of this tax lot.
3. To the extent that any law, order, deed, agreement or other legally enforceable public or private right or requirement provides that tax lot 1500 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

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.”

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 B
COMPENSATION UNDER ORS 197.352)	CLAIM NO. M129376
(BALLOT MEASURE 37) OF)	
Mary Hayes, CLAIMANT)	

Claimant: Mary Hayes (the Claimant)

Property: Township 2S, Range 45E, Section 30, Tax lot 1900
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 Deputy Director of the DLCD as a final order of DLCD and the Land Conservation and Development Commission under ORS 197.352, OAR 660-002-0010(8), and OAR chapter 125, division 145, and by the 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

*Michael Mrossing for
Cora Parker*

Cora R. Parker, Deputy Director

DLCD

Dated this 14th day of November, 2006.

FOR the DEPARTMENT OF
ADMINISTRATIVE SERVICES:

David Hartwig

David Hartwig, Administrator

DAS, State Services Division

Dated this 14th day of November, 2006.

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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**

November 14, 2006

STATE CLAIM NUMBER: M129376

NAME OF CLAIMANT: Mary Hayes

MAILING ADDRESS: 83834 Airport Lane
Joseph, Oregon 97846

PROPERTY IDENTIFICATION: Township 2S, Range 45E, Section 30
Tax lot 1900

Township 2S, Range 45E, Section 31
Tax lot 1500

Wallowa County

OTHER INTEREST IN PROPERTY: Reid Kooch
82557 Century Lane
Enterprise, Oregon 97828

DATE RECEIVED BY DAS: May 22, 2006

180-DAY DEADLINE: November 18, 2006

I. SUMMARY OF CLAIM

The claimant, Mary Hayes, seeks compensation in the amount of \$2 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 150.54-acre subject property into 5-acre parcels and to develop a dwelling on each parcel.¹ The subject property is located at 83834 Airport Lane, adjacent to the City of Joseph and along the west side of the Wallowa River, 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 valid in part. Department staff

¹ The subject property consists of two tax lots. Tax lot 1500 consists of 145.09 acres, and tax lot 1900 consists of 5.45 acres. Tax lot 1500 is zoned by Wallowa County as Exclusive Farm Use (EFU). Tax lot 1900 is zoned by Wallowa County as M-1 (Industrial).

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 Mary Hayes's division of tax lot 1500 into 5-acre parcels and her development of a dwelling on each parcel: applicable provisions of Statewide Planning Goal 3 (Agricultural Lands), ORS 215 and Oregon Administrative Rules (OAR) 660, division 33. These laws will not apply to the claimant's use of tax lot 1500 only to the extent necessary to allow her to use this tax lot for the use described in this report, and only to the extent that use was permitted when she acquired it on October 1, 1964.

Further, the department has determined that the claim for tax lot 1900 is not valid because neither the Commission nor the department has enforced laws that apply to or restrict the claimant's desired use of tax lot 1900. (See the complete recommendation in Section VI. of this report.)

III. COMMENTS ON THE CLAIM

Comments Received

On September 28, 2006, 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, two written comments were received in response to the 10-day notice.

The aspects of the comments addressing whether the claim meets the criteria for relief under ORS 197.352 have been considered by the department. 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 May 22, 2006, for processing under OAR 125, division 145. The claim identifies Goal 3, ORS 215 and OAR 660, division 33, 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, Mary Hayes, acquired an interest in the subject property on October 1, 1964, as reflected by a warranty deed and correction deed included with the claim. The Wallowa County Assessor’s Office confirms the claimant’s current ownership of an interest in the subject property.

Conclusions

The claimant, Mary Hayes, is an “owner” of the subject property as that term is defined by ORS 197.352(11)(C), as of October 1, 1964.

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 150.54-acre subject property into 5-acre parcels and to develop a dwelling on each parcel, and that the desired use is not permitted under current land use regulations.

Tax lot 1500 is zoned by Wallowa County as EFU, as required by Goal 3, in accordance with ORS 215 and OAR 660, division 33, because 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, 215.284 and 215.780 and OAR 660, division 33, enacted or adopted pursuant to Goal 3, prohibit the division of EFU-zoned land into parcels less than 80 acres and establish standards for development of dwellings on existing or proposed parcels on that land.

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 (2005 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.)

Tax lot 1900 is zoned by Wallowa County as M-1, an industrial zone. The claimant has not established that a state land use regulation applies to or restricts her desired use of tax lot 1900. Further, the department has not identified any state laws that apply to or restrict the claimant's desired use of tax lot 1900 with the effect of reducing its fair market value.

Conclusions

The current minimum lot size and dwelling standards established by applicable provisions of Goal 3, ORS 215 and OAR 660, division 33, were all enacted or adopted after the claimant acquired tax lot 1500 in 1964 and do not allow the desired division or residential development of this tax lot. These laws restrict the use of tax lot 1500 relative to the uses allowed when the claimant acquired it. However, none of these regulations apply to or restrict the claimant's desired use of tax lot 1900. Further, the department has not identified any state laws that apply to or restrict the claimant's desired use of tax lot 1900.

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 currently apply to the claimant's use of the subject property, and that may 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 tax lot 1500 or 1900 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.

² Tax lot 1500 is "agricultural land" because it contains Natural Resources Conservation Service Class I-VI soils.

3. Effect of Regulations on Fair Market Value

In order to establish a valid claim, ORS 197.352(1) requires that the land use regulations (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 \$2 million as the reduction in the subject property’s fair market value due to the regulations that restrict the claimant’s desired use of the property. This amount is based on the claimant’s estimate and a comparative market analysis included with the claim.

As explained in Section V.(2) of this report, the claimant, Mary Hayes, has not established that any state laws apply to or restrict her desired use of tax lot 1900. Accordingly, the department is also unable to determine that the enforcement or enactment of any state land use regulations have had the effect of reducing the fair market value of tax lot 1900.

Conclusions

The claimant estimates that the effect of the enforcement or enactment of the identified regulations on the fair market value of the subject property is a reduction of \$2 million. Although the claimant has not established that state land use regulations have had any effect on the value of tax lot 1900, her claim includes evidence that the identified state land use regulations have reduced the fair market value of tax lot 1500 to some extent.

Without an appraisal or other documentation, it is not possible to substantiate the specific dollar amount by which state land use regulations have reduced the fair market value of tax lot 1500. Nevertheless, based on the evidence in the record for this claim, the department determines that the fair market value of that tax lot has been reduced to some extent as a result of the enforcement or enactment 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 tax lot 1500, including applicable provisions of Goal 3, ORS 215 and OAR 660, division 33, which Wallowa County has implemented through its current EFU zone. All of these land use regulations were enacted or adopted after the claimant acquired tax lot 1500.

The department received comments noting that there may be federal laws that apply to and restrict the claimant’s desired use of the subject property, and that there may be treaty rights or interests of the Nez Perce Tribe relating to the subject property. Those comments are reflected in the proposed form of relief, in Section VI of this draft report.

The department further finds that no state land use regulations apply to or restrict the claimant's desired use of tax lot 1900. As a result, there is no basis for evaluating the application of the exceptions in ORS 197.352(3) with regard to tax lot 1900.

Conclusions

Without a specific development proposal for tax lot 1500, 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 division and development of tax lot 1500 were in effect when the claimant acquired it in 1964. As a result, these laws are not exempt under ORS 197.352(3)(E).

Laws in effect when the claimant acquired tax lot 1500 are exempt under ORS 197.352(3)(E) and will continue to apply to the claimant's use of the property. In addition, Wallowa County notes that a portion of tax lot 1500 is located in a flood plain zone. ORS 197.352(3)(B) specifically exempts regulations "restricting or prohibiting activities for the protection of public health and safety. . . ." To the extent tax lot 1500 is located in the flood plain zone, Goal 7 (Areas Subject to Natural Disasters and Hazards) will apply to the claimant's use of tax lot 1500 and is exempt under ORS 197.352(3)(B) (Public Health and Safety). The county's flood plain regulations also may be exempt under ORS 197.352(3)(B) and (C) (to the extent that they are required by federal law).

There may be other laws or limitations on use that continue to apply to the claimant's use of tax lot 1500 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 tax lot 1500 based on the uses 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 tax lot 1500.

As explained in Section V.(1) of this report, the department has not identified any state laws that apply to or restrict the claimant's desired use of tax lot 1900. Therefore, the issue of whether any laws are exempt under ORS 197.352 is not relevant with regard to tax lot 1900.

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 laws that restrict the claimant's desired use of the property with the effect of reducing 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 subject 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 in part, 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, the department has determined that the claimant has not established that any state land use regulations apply to or restrict her desired use of tax lot 1900 or have the effect of reducing the fair market value of this tax lot.

Based on the findings and conclusions set forth in this report, the state land use regulations identified in the claim restrict the claimant's desired use of tax lot 1500. 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 \$2 million. However, because the claim does not provide an appraisal or other 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 also be necessary to verify whether or the extent to which the claimant's desired use of tax lot 1500 was allowed when the claimant 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 tax lot 1500 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 Mary Hayes to use tax lot 1500 for a use permitted at the time she acquired this tax lot on October 1, 1964.

Conclusions

Based on the record before the department, the claimant, Mary Hayes, has not established that she is entitled to relief under ORS 197.352 as to tax lot 1900 because no state land use regulations apply to or restrict her desired use of tax lot 1900. Therefore, the department recommends that this claim be denied as to tax lot 1900.

Based on the record before the department, the claimant, Mary Hayes, has established that she is entitled to relief under ORS 197.352 as to tax lot 1500. The department recommends that the claim for tax lot 1500 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 state laws to Mary Hayes's division of tax lot 1500 into 5-acre parcels and to her development of a dwelling on each parcel: applicable provisions of Goal 3, ORS 215 and OAR 660, division 33. These laws will not apply to the claimant's use of tax lot 1500 only to the extent necessary to allow her to use this tax lot for the use described in this report, and only to the extent that use was permitted when she acquired it on October 1, 1964.

2. The action by the State of Oregon provides the state's authorization to the claimant to use tax lot 1500 for the use described in this report without application of the otherwise applicable provisions of Goal 3, ORS 215 and OAR 660, division 33. The claimant's use of tax lot 1500 is still subject to any other state land use regulations that may apply to her use of this tax lot.

3. To the extent that any law, order, deed, agreement or other legally enforceable public or private right or requirement provides that tax lot 1500 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 or rights to the use of tax lot 1500 imposed by or held by a tribal entity or by private parties.

4. Any use of tax lot 1500 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 tax lot 1500, 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 tax lot 1500 by the claimant.

VII. COMMENTS ON THE DRAFT STAFF REPORT

The department issued its draft staff report on this claim on October 23, 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. No comments were received.