

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. M129417
(BALLOT MEASURE 37) OF)	
Donna Cone, CLAIMANTS)	

Claimants: Donna Cone (the Claimants)

Property: Township 1S, Range 3W, Section 24, Tax lot 700, Washington County
(the Property)

Claim: The demand for compensation and any supporting information received from the
Claimants by the State of Oregon (the Claim).

Claimants submitted the Claim to the State of Oregon under ORS 197.352. Under OAR 125-145-0010 *et seq.*, the Department of Administrative Services (DAS) referred the Claim to the Department of Land Conservation and Development (DLCD) as the regulating entity. This order is based on the record herein, including the Findings and Conclusions set forth in the Final Staff Report and Recommendation of DLCD (the DLCD Report) attached to and by this reference incorporated into this order.

ORDER

The Claim is 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 Donna Cone's division of the 59.41-acre subject property into twenty-nine 2-acre parcels and 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 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 May 15, 1973.
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 May 15, 1973. On May 15, 1973, the property may have been subject to the applicable provisions of ORS 215 (1971 edition) then 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 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 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.

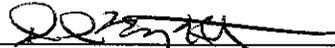
FOR DLCD AND THE LAND
CONSERVATION AND
DEVELOPMENT COMMISSION:
Lane Shetterly, Director



Cora R. Parker, Deputy Director
DLCD

Dated this 20th day of November, 2006.

FOR the DEPARTMENT OF
ADMINISTRATIVE SERVICES:



David Hartwig, Administrator
DAS, State Services Division

Dated this 20th day of November, 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**

November 20, 2006

STATE CLAIM NUMBER: M129417

NAME OF CLAIMANT: Donna Cone

MAILING ADDRESS: 3391 South White Gold Avenue
Tucson, Arizona 85735

PROPERTY IDENTIFICATION: Township 1S, Range 3W, Section 24
Tax lot 700
Washington County

OTHER CONTACT INFORMATION: Mark Huglin, Attorney
4004 Kruse Way Place, Suite 200
Lake Oswego, Oregon 97035

OTHER INTEREST IN PROPERTY: Benjamin Cseri (co-owner)
Eric Christiansen (co-owner)

DATE RECEIVED BY DAS: May 30, 2006

180-DAY DEADLINE: November 26, 2006

I. SUMMARY OF CLAIM

The claimant, Donna Cone, seeks compensation in the amount of \$4,833,300 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 59.41-acre subject property into twenty-nine 2-acre parcels, develop a dwelling on each parcel and develop a community water system.¹ The subject property is located at 31475 Southwest Riedwig Road, near Cornelius, in Washington County. (See claim.)

¹ On September 5, 2006, David Smith, the attorney for Benjamin Cseri, submitted a letter requesting to amend Ms. Cone's claim to request fifty-nine 1-acre parcels instead of the twenty-nine 2-acre parcels as specified in Ms. Cone's claim. (Benjamin Cseri shares with Eric Christiansen a 98 percent interest in the subject property.) Mr. Smith does not represent Ms. Cone and does not have authority to act on her behalf. If Ms. Cone wishes to file a new claim for a new use, she may do so. However, due to the strict deadlines imposed by ORS 197.352 for the issuance of final decisions on claims filed under the statute, the department cannot accept substantive amendments to previously filed claims.

The claim also suggests that the claimant may desire to convey the newly created parcels for development. In effect, the claimant requests that a decision of the department to "not apply" (waive) certain laws as set forth in this report

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 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 Donna Cone's division of the 59.41-acre subject property into twenty-nine 2-acre parcels and 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 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 May 15, 1973.

The department has also determined that the claim is not valid with regard to the claimant's desire to develop of a community water system because the claimant has not established how the desired system is restricted by current land use regulations, with the effect of reducing the property's fair market value. (See the complete recommendation in Section VI. of this report.)

III. COMMENTS ON THE CLAIM

Comments Received

On September 11, 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, eight written comments were received in response to the 10-day notice.

The comments do not address whether the claim meets the criteria for relief under ORS 197.352. Comments concerning the effects a use of the subject property may have on surrounding areas are generally not something that the department is able to consider in determining whether to waive a state law. If funds do become available to pay compensation, then such effects may become relevant in determining which claims to pay compensation for instead of waive a state law. (See the comment letters in the department's claim file.)

IV. TIMELINESS OF CLAIM

Requirement

ORS 197.352(5) requires that a written demand for compensation be made:

1. For claims arising from land use regulations enacted prior to the effective date of Measure 37 (December 2, 2004), within two years of that effective date, or the date the public entity applies

be transferable with the property. ORS 197.352 only authorizes a state agency to waive a law in order to allow the current owner a use of the property permitted at the time that owner acquired the property. A determination of transferability is beyond the scope of relief that the department may grant under ORS 197.352. The Oregon Department of Justice has advised the department that "[i]f the current owner of the real property conveys the property before a new use allowed by the public entity is established, then the entitlement to relief will be lost."

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 30, 2006, for processing under OAR 125, division 145. The claim identifies the following as the basis for the claim: Goal 3, ORS 215.213, OAR 660-033-0120 and 660-033-0130 and Washington County's CDO Sections 344 and 610-2. Only laws that were enacted or adopted prior to December 2, 2004, are the basis for this claim.

Conclusions

The claim has been submitted within two years of the effective date of Measure 37 (December 2, 2004), based on land use regulations enacted or adopted prior to December 2, 2004, and is therefore timely filed.

V. ANALYSIS OF CLAIM

1. Ownership

ORS 197.352 provides for payment of compensation or relief from specific laws for "owners" as that term is defined in ORS 197.352. ORS 197.352(11)(C) defines "owner" as "the present owner of the property, or any interest therein."

Findings of Fact

The claimant, Donna Cone, acquired the subject property on May 15, 1973, as reflected by a real estate contract included with the claim. On April 14, 2006, the claimant conveyed 98 percent of her interest in the subject property to Benjamin Cseri and Eric Christiansen, as reflected by a memorandum of contract of sale provided by Washington County's Planning Department. On May 13, 2006, the claimant conveyed her remaining interest in the subject property to the Donna M. Cone Revocable Trust, with herself as trustee, as reflected by a bargain and sale deed provided by Washington County's Planning Department.² The Washington County Assessor's Office confirms the claimant's current ownership of the subject property.

Conclusions

The claimant, Donna Cone, is an "owner" of the subject property as that term is defined by ORS 197.352(11)(C), as of May 15, 1973.

² Transfer of property to a revocable trust does not result in a change in ownership for purposes of ORS 197.352.

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 59.41-acre subject property into twenty-nine 2-acre parcels, develop a dwelling on each parcel and develop a community water system. It indicates that the use is not allowed under Goal 3, ORS 215.213, OAR 660-033-0120 and 660-033-0130, as well as under local land use regulations.

The claim is based generally on the applicable provisions of state law that require Exclusive Farm Use (EFU) zoning and restrict uses on EFU-zoned land. The claimant's property is zoned by Washington County as Agriculture and Forest District (AF-20) 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 3.³ 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 215.213, 215.263 and 215.780 and OAR 660, division 33, enacted or adopted pursuant to Goal 3, prohibit the division of EFU-zoned land in marginal lands counties 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 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 in a marginal lands county under ORS 215.213. OAR 660-033-0130(4)(e) (applicable to non-farm dwellings in marginal lands counties) became effective on August 7, 1993. 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 claimant acquired the subject property on May 15, 1973, prior to the adoption of the statewide planning goals and their implementing statutes and regulations. At that time, the subject property was subject to Washington County's Agriculture District (F-1) zone, which had no established minimum lot sizes and required dwellings to be developed in conjunction with farm use. The F-1 zone may be a qualified farm zone subject to ORS 215 (1971 edition).

³ The claimant's property is "agricultural land" because it contains Natural Resources Conservation Service Class I-IV soils.

The claimant also seeks waiver of the above regulations in order to allow her to establish what she summarily describes as a “community water system.” However, the claimant has not established how the above regulations restrict her ability to establish such a system. Goal 11 (Public Facilities and Services) and OAR 660-011-0065, which the claimant does not cite as restricting her desired use of the subject property, address the provisions of water service to rural lands.

Goal 11, which also became effective on January 25, 1975, generally prohibits urban levels of public facilities and services on lands that are outside an urban growth boundary. Goal 11 and its implementing rules have two components: one that prohibits an owner from utilizing urban-level facilities or services to serve the property, and another that prohibits service providers from extending their facilities to serve property outside an urban growth boundary. The former can restrict a claimant’s use of property. The latter is a restriction on service providers.

Goal 11 and OAR 660, division 11, could apply to the claimant’s use of the subject property only to the extent that these regulations would restrict the claimant’s development of urban-level community water facilities on the subject property. Even then, the provisions of OAR 660-011-0065 do not necessarily prohibit such development. However, the claimant has not established how these regulations apply to and restrict her desired community water system.

Conclusions

The current zoning requirements, 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 the subject property in 1973 and do not allow the desired division or residential development of the property. These laws restrict the use of the subject property relative to the uses allowed when the claimant acquired the property. However, to the extent that Washington County’s F-1 zone was a qualified farm zone in May 1973, the claim does not establish whether or to what extent the claimant’s desired division and development of the subject property satisfy the provisions of ORS 215 (1971 edition) then in effect. Further, the claimant has not established how the above regulations restrict her desired community water system.

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 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.”

Findings of Fact

The claim includes an estimate of \$4,833,300 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 assessment of the property's value.

Conclusions

As explained in Section V.(1) of this report, the claimant is Donna Cone who acquired the subject property on May 15, 1973. 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 and residential development of the property. The claimant has not established how these laws restrict her development of a community water system with the effect of reducing the property's fair market value. The claimant estimates that the effect of the regulations on the fair market value of the subject property is a reduction of \$4,833,300.

Without an appraisal or other documentation, and without verification of 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, 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.

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, including applicable provisions of Goal 3, ORS 215 and OAR 660, division 33, which Washington County has implemented through its current AF-20 zone. With the exception of provisions of ORS 215, which may have applied to the property when the claimant acquired it in 1973, 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. With the exception of applicable provisions of ORS 215 (1971 edition), it appears that none of the general statutory, goal and rule restrictions on division and development of the claimant's property were

in effect when the claimant acquired it in 1973. 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 continue to apply to the claimant's use of the property. 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 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 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 laws that restrict the use of the subject 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 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, 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 division and residential development of the subject property. The claimant has not established how these laws restrict her development of a community water system. 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 \$4,833,300. 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 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 Donna Cone to use the subject property for a use permitted at the time she acquired the property on May 15, 1973.

Conclusions

Based on the record, the department recommends that the claim be denied as to the claimant's demand for compensation or waiver to allow development of a community water system because the claimant has not established how that desired system is restricted by current land use regulations, with the effect of reducing the property's fair market value. The department recommends that the claim otherwise 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 Donna Cone's division of the 59.41-acre subject property into twenty-nine 2-acre parcels and 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 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 May 15, 1973.
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 May 15, 1973. On May 15, 1973, the property may have been subject to the applicable provisions of ORS 215 (1971 edition) then 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 October 30, 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.