

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. M129453
(BALLOT MEASURE 37) OF)	
Richard and Cynthia Rowe, CLAIMANTS)	

Claimants: Richard and Cynthia Rowe (the Claimants)

Property: Township 39S, Range 8E, Section 29, Tax lots 100 and 400

Township 39S, Range 8E, Section 29D, Tax lot 100

Township 29S, Range 8E, Section 21, Tax lot 1102

Township 39S, Range 8E, Section 20, Tax lot 420
Klamath 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 Richard and Cynthia Rowe's division of the portion of the property not subject to a 1984 wildlife overlay into approximately thirty-one 20-acre parcels and to their development of a dwelling on each parcel: applicable provisions of Goal 5 and OAR 660, division 16, as implemented through Klamath County's 1995 SRO for a Medium-Low Density Winter Range and OAR 660, division 23, adopted after the claimants acquired the subject property. These land use regulations will not apply to the claimants only to the extent necessary to allow them to use the subject property for the use described in this report, and only to the extent that use was permitted when they acquired the property on July 23, 1992.

2. The action by the State of Oregon provides the state's authorization to the claimants to use the property subject to the standards in effect on July 23, 1992. On that date, the property was subject to the county's acknowledged NR-20 zone and the provisions of Goal 5 and OAR 660, division 16, as implemented through the county's 1984 SRO for a Medium-Low Density Deer Winter Range.

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 claimants first obtain 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 claimants 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; (c) Goal 5 in effect in 1992, as applied through the county's 1984 SRO for a Medium-Low Density Deer Winter Range; and (d) 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 claimants to use the subject property, it may be necessary for them 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 claimants 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 claimants.

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 30th day of November, 2006.

FOR the DEPARTMENT OF
ADMINISTRATIVE SERVICES:


David Hartwig, Administrator
DAS, State Services Division
Dated this 30th 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."

BALLOT MEASURE 37 (ORS 197.352) CLAIM FOR COMPENSATION

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

November 28, 2006

STATE CLAIM NUMBER: M129453

NAMES OF CLAIMANTS: Richard and Cynthia Rowe

MAILING ADDRESS: 13047 Highway 66
Klamath Falls, Oregon 97601

PROPERTY IDENTIFICATION: Township 39S, Range 8E, Section 29
Tax lots 100 and 400
Township 39S, Range 8E, Section 29D
Tax lot 100
Township 29S, Range 8E, Section 21
Tax lot 1102
Township 39S, Range 8E, Section 20
Tax lot 4200
Klamath County

DATE RECEIVED BY DAS: June 5, 2006

180-DAY DEADLINE: December 2, 2006

I. SUMMARY OF CLAIM

The claimants, Richard and Cynthia Rowe, seek compensation in the amount of \$1,447,000 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 claimants desire compensation or the right to divide the portion of the 630-acre subject property not subject to a 1984 wildlife overlay zone into approximately thirty-one 20-acre parcels and to develop a dwelling on each parcel.¹ The subject property is located at 12355 Highway 66, near Klamath Falls, in Klamath County. (See claim.)

¹ The claim, as submitted, lists "NR20" (Non-resource 20-acre minimum) as the proposed use. Based on a partition application filed with Klamath County (LP-06-06), it appears that the property is subject to both a 1984 wildlife overlay and a 1995 wildlife overlay. In a conversation with department staff, claimant Richard Rowe estimated that the 1984 overlay covers approximately seven acres of the northwest portion of the property. The extent of the property covered by the 1984 overlay was disputed by neighbors in Klamath County LP-06-06. According to Mr. Rowe, the entire property was subject to the 1995 overlay. The claimants seek a waiver of the 1995 overlay and acknowledge that the area affected by the 1984 overlay will not change.

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 Richard and Cynthia Rowe's division of the portion of the property not subject to a 1984 wildlife overlay into approximately thirty-one 20-acre parcels and to their development of a dwelling on each parcel: applicable provisions of Statewide Planning Goal 5 (Natural Resources, Scenic and Historic Areas and Open Spaces) and OAR 660, division 16, as implemented through Klamath County's 1995 Significant Resource Overlay (SRO) for a Medium-Low Density Winter Range² and OAR 660, division 23, adopted after the claimants acquired the subject property. These laws will not apply to the claimants only to the extent necessary to allow them to use the subject property for the use described in the report, and only to the extent that use was permitted when they acquired it on July 23, 1992. (See the complete recommendation in Section VI. of this report.)

III. COMMENTS ON THE CLAIM

Comments Received

On September 27, 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, one written comment was received in response to the 10-day notice.

The comment is relevant to whether a state law restricts the claimants' use of the subject property and whether the laws that are the basis for the claim are exempt under ORS 197.352(3). The comment has been considered by the department in preparing this report. (See the comment letter 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.

² Klamath County Ordinance 45.31, amending Klamath County Land Development Code Article 57 (February 15, 1995).

Findings of Fact

This claim was submitted to DAS on June 5, 2006, for processing under OAR 125, division 145. The claim identifies “fish and wildlife overlay” 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 Ballot 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

On July 23, 1992, the claimants, Richard and Cynthia Rowe, acquired the subject property, which consists of six tax lots, as reflected by a warranty deed included with the claim. The Klamath County Assessor’s Office confirms the claimants’ current ownership of the subject property.

Conclusions

The claimants, Richard and Cynthia Rowe, are “owners” of the subject property, as that term is defined by ORS 197.352(11)(C), as of July 23, 1992.

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 claimants’ 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 claimants or a family member acquired the property.

Findings of Fact

The claim indicates the claimants desire to divide the portion of the 630-acre subject property not subject to a 1984 wildlife overlay into approximately thirty-one 20-acre parcels and to develop a dwelling on each parcel, and that a 1995 overlay zone prevents the desired use.

The claim is based generally on the provisions of state law that provide for significant resource protection under Goal 5, and restrict uses on property subject to those protections. The subject property is zoned by Klamath County as NR-20 (Non-resource 20-acre minimum) with an SRO

for a Medium-Low Density Deer Winter Range, which was adopted in 1984 and amended in 1995.

Goal 5 became effective on January 25, 1975. The administrative rule implementing Goal 5, OAR 660, division 16 (Requirements and Application Procedures for Complying with Goal 5), became effective on May 18, 1981, but did not apply to landowners until local jurisdictions implemented the Goal 5 process. Klamath County's SRO for a Medium-Low Density Deer Winter Range was applied to the northwest portion of the subject property in 1984 and generally requires a permit, subject to development standards and wildlife conservation plans. The 1984 SRO, the overlay map and the associated Klamath County Land Development Code provisions were amended in 1995, with the adoption of a new deer winter range overlay map and land development code residential development standards. The 1995 overlay map subjected the entire property to the deer winter range overlay regulations. OAR 660, division 23 (Procedures and Requirements for Complying with Goal 5), including Section 0110, Wildlife Habitat, became effective on September 1, 1996.

The claimants acquired the subject property on July 23, 1992, after the adoption of Goal 5, as implemented through Klamath County's 1984 SRO for a Medium-Low Density Deer Winter Range, but before the establishment of the more restrictive 1995 SRO.

Conclusions

The requirements of Goal 5 and OAR 660, division 16, as implemented through Klamath County's 1995 SRO for a Medium-Low Density Winter Range and OAR 660, division 23, adopted after the claimants acquired the subject property in 1992 do not allow the desired development of the property. These regulations restrict the use of the subject property relative to uses permitted when the claimants acquired the property in 1992.

3. Effect of Regulations on Fair Market Value

In order to establish a valid claim, ORS 197.352(1) requires that the land use regulation(s) described in Section V.(2) of this report must have "the effect of reducing the fair market value of the property, or any interest therein."

Findings of Fact

The claim includes an estimate of \$1,477,000,³ as the reduction in the subject property's fair market value due to the regulations that restrict the claimants' desired use of the property. This amount is based on the claimants' assessment of the property's value.

Conclusions

As explained in Section V.(1) of this report, the claimants, Richard and Cynthia Rowe, acquired the subject property on July 23, 1992. Under ORS 197.352, the claimants are due compensation

³ The claim, as submitted, states "market value for 80 ac is only \$80,000. Market value for 20 ac is 75,000," as the basis of the value reduction. In a follow up conversation between DAS staff and Richard Rowe, Mr. Rowe indicated a loss of value of \$1,477,000.

for land use regulations that restrict the use of the subject property in a manner that reduces its fair market value. Based on the findings and conclusions in Section V.(2) of this report, laws adopted since the claimants acquired the subject property restrict the desired division and development of the property. The claimants estimate the reduction in value due to the restrictions to be \$1,477,000.

Without an appraisal or other documentation, and without verification of whether or the extent to which the claimants' desired use of the property was allowed at the time they 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 5 and OAR 660, division 16, which Klamath County has implemented through its SRO for a Medium-Low Density Deer Winter Range, and provisions of OAR 660, division 23. The 1984 SRO was in effect when the claimants acquired the subject property in 1992. The 1995 SRO was adopted after the claimants 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 the 1995 SRO, implemented pursuant to Goal 5, and OAR 660, divisions 16, and 23, were not in effect when the claimants acquired the property in 1992. As a result, these laws are not exempt under ORS 197.352(3)(E). The provisions of the 1984 SRO, implemented pursuant to Goal 5 and OAR 660, division 16, are exempt under ORS 197.352(3)(E), which exempts laws in effect when the claimants acquired the property, and will continue to apply to the property.

Other laws in effect when the claimants acquired the subject property are also exempt under ORS 197.352(3)(E) and will continue to apply to the claimants' use of the property. There may be other laws that continue to apply to the claimants' 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 claimants seek 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 claimants have 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 claimants should be aware that the less information they have 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 their 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 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 claimants' desired use. The claim asserts that the laws enforced by the Commission or the department reduce the fair market value of the subject property by \$1,477,000. 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 the compensation due for this claim, it would also be necessary to verify whether or the extent to which the claimants' desired use of the subject property was allowed under the standards in effect when they acquired the property. 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 claimants' desired use of the subject property was allowed under the standards in effect when they 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 the claimants to use the property for a use permitted when they acquired it on July 23, 1992.

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 Richard and Cynthia Rowe's division of the portion of the property not subject to a 1984

wildlife overlay into approximately thirty-one 20-acre parcels and to their development of a dwelling on each parcel: applicable provisions of Goal 5 and OAR 660, division 16, as implemented through Klamath County's 1995 SRO for a Medium-Low Density Winter Range and OAR 660, division 23, adopted after the claimants acquired the subject property. These land use regulations will not apply to the claimants only to the extent necessary to allow them to use the subject property for the use described in this report, and only to the extent that use was permitted when they acquired the property on July 23, 1992.

2. The action by the State of Oregon provides the state's authorization to the claimants to use the property subject to the standards in effect on July 23, 1992. On that date, the property was subject to the county's acknowledged NR-20 zone and the provisions of Goal 5 and OAR 660, division 16, as implemented through the county's 1984 SRO for a Medium-Low Density Deer Winter Range.

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 claimants first obtain 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 claimants 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; (c) Goal 5 in effect in 1992, as applied through the county's 1984 SRO for a Medium-Low Density Deer Winter Range; and (d) 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 claimants to use the subject property, it may be necessary for them 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 claimants 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 claimants.

VII. COMMENTS ON THE DRAFT STAFF REPORT

The department issued its draft staff report on this claim on November 6, 2006. OAR 125-145-0100(3), provided an opportunity for the claimants or the claimants' 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.